APPENDIX A

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

August Term, 1998

(Argued: March 29, 1999 Decided: December 28, 2000)

Docket No. 98-9136

ELISHA D. HACK, JEREMY A. HERSHMAN, BATSHEVA GREER, and LISA B. FRIEDMAN,

Plaintiffs-Appellants,

v.

THE PRESIDENT AND FELLOWS OF YALE COLLEGE d/b/a YALE CORPORATION and YALE UNIVERSITY, RICHARD H. BRODHEAD, and BETTY TRACHTENBERG,

Defendants-Appellees,

THE RUTHERFORD INSTITUTE,

Amicus Curiae,

THE CATHOLIC LEAGUE FOR RELIGIOUS & CIVIL RIGHTS,

Movant.

Before:

LEVAL and POOLER, *Circuit Judges,*

and MORAN[*]**,** *Senior District Judge.*

Appeal from a judgment dismissing plaintiffs' complaint in its entirety.

Affirmed, with Judge Moran dissenting in part.

NATHAN LEWIN (Richard W. Garnett IV, Miller Cassidy Larroca & Lewin LLP), Washington, DC, *for Plaintiffs-Appellants.*

FELIX J. SPRINGER (Allan B. Taylor, James Sicilian, Victoria Woodin Chavey, Day Berry & Howard LLP, Dorothy Robinson, Vice President and General Counsel, Yale University, New Haven, Conn., Of Counsel), Hartford, Conn., *for Defendants-Appellees.*

KENNETH LASSON, Professor Law, University of Baltimore, Baltimore, Md., filed a brief for Amici Curiae Law Professors Laurence Katz, University of Baltimore School of Law, Steven H. Resnicoff, DePaul University College of Law, John W. Welch, Brigham Young University School of Law.

THOMAS MARCELLE, Slingerlands, N.Y. (Kimball E. Hazelwood, The Rutherford Institute, Of Counsel), filed a brief for *Amicus Curiae*, The Rutherford Institute.

KEVIN J. HASSON, ERIC W. TREENE, ROMAN P. STORZER, filed a brief for *Amicus Curiae* The Becket Fund for Religious Liberty.

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[*] Honorable James B. Moran, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

MORAN, *Senior District Judge*:

Yale College (Yale) requires all unmarried freshmen and sophomores under the age of 21 to reside in college dormitories, all of which are co-educational. The plaintiffs were Yale freshmen and sophomores when they brought this suit. They represent that as devout Orthodox Jews they cannot reside in those dormitories because to do so would conflict with their religious convictions and duties. Plaintiffs contend that Yale is a state actor or instrumentality and, therefore, the First, Fourth, and Fourteenth Amendments invalidate the parietal rule pursuant to 42 U.S.C. § 1983; that in any event they are entitled to discovery to explore the interrelationship between Yale and the governments of Connecticut and New Haven; that Yale's mandatory on-campus housing requirement is both an attempt to monopolize a New Haven housing market in violation of § 2 of the Sherman Antitrust Act and a tying arrangement in violation of § 1 of that statute; and that Yale's refusal to exempt religious observers from co-educational housing violates the Fair Housing Act, 41 U.S.C. § 3601 *et seq*.

The district court (Alfred V. Covello, C.J.) granted defendants' motion to dismiss for failure to state a claim upon which relief can be granted, *Hack v. President and Fellows of Yale College*, 16 F.Supp.2d 183 (D.Conn.1998), and plaintiffs appealed. We affirm, with this judge dissenting in part, as explained in section III.B.

I

The threshold inquiry for plaintiffs' constitutional claims is whether Yale can be considered a state actor or instrumentality acting under color of state law. The district court concluded that it could not. We agree.

What constitutes state action has been variously described by courts as "an extremely difficult question," "murky waters," "obdurate," and a "protean concept," *see Krynicky v. University of Pittsburgh*, 742 F.2d 94, 97 (3rd Cir.1984) (citations omitted), as the Supreme Court has grappled with differing factual circumstances, most recently in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). The Court acknowledged in *Lebron v. National RR Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), that "[i]t is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.' " *Id.* at 378, 115 S.Ct. 961 (*quoting Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (O'Connor, J., dissenting)). As in *Lebron*, however, we need not "traverse that difficult terrain," 513 U.S. at 378, 115 S.Ct. 961, because plaintiffs rely almost entirely upon *Lebron* in contending that Yale is not, in reality, a private entity but is, rather, an agency or instrumentality of the State of Connecticut for the purpose of individual constitutional rights.

Plaintiffs begin by describing the significant interrelationships between Yale and the state from colonial days well into the latter nineteenth century. To that end they note that Yale is chartered by special legislation and, indeed, that charter is confirmed in the Connecticut Constitution. They contend that Yale was created to further public, governmental objectives, objectives that are equally valid today. Yale, they point out, must submit its budget and financial report to the Connecticut legislature. Finally[1], they

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[1] Plaintiffs also refer to actions by Yale, the state, and New Haven, to accommodate Yale's large and tax exempt presence in New Haven. They do not, however, and they could not, claim that Yale is an instrumentality of New Haven, and we fail to see how those accommodations materially strengthen their *Lebron* analysis.

argue that the presence of the Governor and Lieutenant Governor, as *ex officio* members of the nineteen-member "Fellows of Yale College" governing board, provides further support for the conclusion that Yale is a governmental entity.

In *Lebron*, the Supreme Court determined that Amtrak was a governmental entity:

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 400, 115 S.Ct. 961. In the wake of Lebron, other courts have concluded that the Court set forth a three-prong standard only if (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains "permanent authority to appoint a majority of the directors of the corporation" will the corporation be deemed a government entity for the purpose of the state action requirement. *Id.* at 400, 115 S.Ct. 961. *See Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 492 (1st Cir.1996); *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-922 (9th Cir.1996); *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401 (9th Cir.1996); *Abu-Jamal v. National Pub. Radio*, 1997 WL 527349,*4, (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C.Cir.1998) (table). Here, the first two factors are easily satisfied: the State of Connecticut created the corporate entity by special law, and higher education is a governmental objective (although not the exclusive province of government). Two of nineteen board members is, however, a long way from control.

Plaintiffs contend that a three-prong test, with one prong requiring "majority" governmental control, is an overly simplistic reading of *Lebron*. They argue that the two highest executive officers of the state are likely to be far more influential than other members, that they carry with them the aura of official action, and that their participation is at least as significant as the Presidential power to appoint a majority of Amtrak board members from specific lists of recommended private sector nominees. We disagree.

We think *Lebron* means what it says. Indeed, the Court there contrasted Comsat with Amtrak, noting that the President appointed only three of fifteen Comsat directors, 513 U.S. at 391, 115 S.Ct. 961, and describing it as a private corporation not government-controlled, *id.* at 397, 115 S.Ct. 961. Moreover, the Court has indicated its reluctance to have the federal courts indulge in evaluations of the effectiveness of governmental persuasion, absent government control. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545-546 n.27, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987). Plaintiffs do not suggest that Connecticut had any involvement in establishing Yale's parietal rules. It is equally clear that the state could not control Yale's policies and operations even if it chose to become involved. Yale, as a private university, did not act under color of law.

Alternatively, plaintiffs sought discovery about the interrelationships between Yale and the governments of Connecticut and New Haven, but the district court dismissed the complaint before any discovery could be initiated. Plaintiffs claim that a ruling before they had an opportunity to initiate discovery was in error. Again, we disagree.

The motion to dismiss tested the pleadings, and for the reasons we have stated we conclude that the allegations do not state a claim that Yale is a *Lebron* state actor. We have assumed that the governor and lieutenant governor may

have attended every board meeting and vigorously participated (although it may be that their role is largely symbolic, a vestigial reminder of a bygone era), but we think that irrelevant. Nor does plaintiffs' contention that discovery might provide a basis for finding state action upon a different theory, such as that enunciated in *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), provide a justification. In seeking reversal of the dismissal they do not argue that their present pleadings support such an alternative theory. Rather, their contention is more of the nature that through discovery something might turn up, and they are not at all specific about what that might be. The district court, however, was not required to wait for the exploration of such a speculative hope. We note, as well, that plaintiffs have pleaded a wealth of information about the College, and not surprisingly so. Yale is not some obscure organization largely unknown in the greater community. Government policies and interrelationships are not generally hidden from the public.

II

Plaintiffs further allege that Yale's requirement that freshmen and sophomores reside in the dormitories is an attempt to monopolize the New Haven student housing market and that it is an illegal arrangement tying the provision of a Yale education to the purchase of unrelated housing services, all in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.

We begin with the observation that if a parietal rule requiring some students to reside in college or university housing runs afoul of the antitrust laws, it has largely escaped the notice of the many colleges and universities across the country that have had and continue to have those rules and the notice of the millions of students who have attended those institutions in the more than a century since

the Sherman Act was enacted. In *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59, 64-65 (2d Cir.1997), we noted that only one reported case involved an antitrust challenge to university housing policies. And there, *American Nat'l Bank & Trust Co. of Chicago v. Board of Regents for Regency Universities*, 607 F.Supp. 845 (N.D.Ill.1984), parietal rules similar to those here were not even questioned.

When we speak of monopolization or attempted monopolization, we necessarily are talking about monopoly power within a relevant market. Plaintiffs, in their monopolization claim, are somewhat unclear about what constitutes the relevant market. They refer to student housing in New Haven, to the housing market for Yale students, and to non-subsidized rental housing in New Haven. We need not, however, seek to determine the relevant market upon which they purportedly rely because it is clear that their focus is upon a contractually created class of consumers: unmarried freshmen and sophomores below the age of 21. Plaintiffs do not claim, nor could they, that Yale controls non-Yale rental housing in New Haven, or that changes in the pricing of Yale housing or in other New Haven housing will have the slightest effect upon what those students will do. Yale does not control the supply of housing or student housing generally, but it does control the demand for some of it by its parietal rules. Economic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for a monopolization claim. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir.1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 345 (N.D.Ill.1997). If plaintiffs have any antitrust claim it necessarily is that Yale has coerced plaintiffs into accepting a tied product.

That claim, however, fails as well. The law was well-summarized in *De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir.1996):

> "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchase[ ] a different (or tied) product.' " *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir.1980) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 104 S.Ct. 1551, 1558, 80 L.Ed.2d 2 (1984); *See also Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 200 (3d Cir.) cert. denied, 513 U.S. 1066, 115 S.Ct. 684, 130 L.Ed.2d 615 (1994).

As to the detailed requirements to state a tying claim --

> [W]e have required allegations and proof of five specific elements before finding a tie illegal: first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

> *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1516-17 (2d Cir.1989) (*citing Yentsch*, 630 F.2d at 56-57).

De Jesus, 87 F.3d at 70.

Plaintiffs contend that their dormitory housing is "tied" to their Yale education (the "tying" product) and that Yale has sufficient economic power in the educational market to coerce their payment for that housing. They allege that a Yale degree "has unique attributes that make it without substitute or equal," including the access it provides to Yale's alumni network and its "incomparable value to potential employers and graduate schools." A Yale education, they contend, has advantages not shared by other institutions of higher learning and this is enough for a finding of sufficient market power in the tying product market--or, since they have so alleged, they are entitled to pursue the matter further through discovery.

The district court agreed that the uniqueness of a product can trigger a tying arrangement claim, *see United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620-21, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977), and so do we. That uniqueness can provide sufficient market power to compel a buyer to purchase a product he would not purchase in a competitive market. *See Jefferson Parish*, 466 U.S. at 16-17, 104 S.Ct. 1551; *Lee v. Life Ins. Co. of North America*, 23 F.3d 14, 16 (1st Cir.1994). Where uniqueness is alleged, questions of market definition and market power will inevitably blend together because the relevant tying product market includes, by definition, only fungible products. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); s*ee also Town Sound and Custom Tops, Inc. v. Chrysler Motors*

Corp., 959 F.2d 468, 479 (3rd Cir.1992) ("If a defendant offers a unique and nonreplicable product, ... other products may not be adequate substitutes for it, and hence are not part of the same market."). Plaintiffs argue, in effect, that the relevant product market is confined to a Yale education. To survive a motion to dismiss, however, the alleged tying product market must be plausible, *see Town Sound*, 959 F.2d at 479 n.12, and we agree with the district court that the market alleged here is not. *See also Little Caesar Enterprises, Inc. v. Smith*, 34 F.Supp.2d 459, 477 n. 30 (E.D.Mich.1998) ("Courts have consistently refused to consider one brand to be a relevant market of its own when the brand competes with other potential substitutes.") (citing cases).

Plaintiffs insist that there is no substitute for a Yale education, that it is unique, and in a collegiate sense that is undoubtedly so. *See Lee v. Life Ins. Co. of North America*, 23 F.3d 14, 17 (1st Cir.1994) (considering "uniqueness" of the University of Rhode Island). The annual rankings of colleges and universities in *U.S. News and World Report*, however, illustrates the obvious: there are many institutions of higher learning providing superb educational opportunities. Those opportunities are not inherently local. Plaintiffs themselves allege that 92.5 percent of the 1997-1998 freshman class came from outside Connecticut. If some of them, including the plaintiffs, were dissatisfied with the Yale parietal rules, they could matriculate elsewhere. The antitrust implications of university housing rules do not depend upon a trier of fact deciding that some universities, or certain departments in some universities, are "unique" and others are not.

Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, supra, is not to the contrary. The court there never reached the relevant market issue, and, if it had, the considerations would have been quite different.

Plaintiffs in *Hamilton* were "locked in" by their investment in housing which they could no longer use because of an abrupt change in policy. That might have raised the concerns voiced in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), but those concerns are not present here. Yale's housing policies were fully disclosed long before plaintiffs applied for admission. They had no "lock-in" costs.

III

Plaintiffs further contend that Yale's refusal to exempt religious observers from co-educational housing violates Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA" or "Title VIII"). The Fair Housing Act provides that "it shall be unlawful [t]o refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any person because of ... religion." 42 U.S.C. § 3604(a). The FHA also prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... religion." 42 U.S.C. § 3604(b).

A. *Standing under the Fair Housing Act*

The district court did not reach the merits of plaintiffs' Fair Housing Act claims because it concluded that the plaintiffs lacked standing. We disagree. The Act provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court...." 42 U.S.C. § 3613(a)(1)(A). A party is an "aggrieved person," according to the definition in 42 U.S.C. § 3602(i)(1), if he or she "claims to have been injured by a discriminatory housing practice." The Act requires only that the party "allege 'injury in fact' within the meaning of Article III of the [United States] Constitution, that is, that he allege 'distinct and

palpable injuries that are fairly traceable to [defendants'] actions.' " *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir.1995) (internal quotation marks omitted) (*citing Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). The Supreme Court has repeatedly directed the courts to give a "generous construction" to the Fair Housing Act. *See, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-212, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). "Congress intended standing under § 812[2] to extend to the full limits of Art. III" and thus courts lack authority to create prudential barriers to standing under the Act. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n. 9, 109, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *Havens Realty*, 455 U.S. at 372, 102 S.Ct. 1114; *See also Comer v. Cisneros*, 37 F.3d 775, 788-89 (2d Cir.1994) (according plaintiffs "the broadest possible grounds for standing"); *Harris v. Itzhaki*, 183 F.3d 1043, 1049-50 (9th Cir.1999) (same); *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir.1996) (same, but finding that a favorable decision could not redress the injury). As *Havens Realty*, *Trafficante* and *Gladstone* make clear, and as *LeBlanc-Sternberg* explained, "[a]n injury need not be economic or tangible in order to confer standing." *LeBlanc-Sternberg*, 67 F.3d at 425 (*citing Havens Realty*, 455 U.S. at 376, 102 S.Ct. 1114).

The student plaintiffs claim a tangible, economic injury. Indeed, they do not seek to compel Yale to provide single-sex housing; they ask to be relieved of the burden of paying for rooms they contend are effectively "made unavailable" to them. We conclude that they have amply

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[2] Section 812 of the Fair Housing Act of 1968, previously codified at 42 U.S.C. § 3612, has been repealed and replaced by 42 U.S.C. § 3613(a). *See* Pub.L. 100-430, § 8(2), Sept. 13, 1988, 102 Stat. 1625.

alleged injury in fact and, accordingly, have standing to pursue Fair Housing Act claims.

POOLER, *Circuit Judge,* with whom **LEVAL,** *Circuit Judge,* concurs:

B. *Failure to State a Claim*

Because we disagree with the district court's conclusion that the students lack standing, we must consider Yale's contention that the students failed to state an FHA claim. We begin with the observation that plaintiffs allege no discriminatory intent on Yale's part, no facially discriminatory policy, and no facts sufficient to constitute disparate impact discrimination.

"[T]he reach of the [FHA] was to replace the ghettos 'by truly integrated and balanced living patterns.' " *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (quoting 114 Cong. Rec. 3422 (1968) (remarks of Sen. Mondale, drafter of the FHA)); *See also Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.) *aff'd in part*, 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (same). We have also said with respect to the FHA that "Congress intended that broad application of the anti-discrimination provisions would ultimately result in residential integration." *Town of Huntington*, 844 F.2d at 936. This inclusive purpose is reflected in the statutory language. Insofar as it is relevant to this case, the FHA declares that it is unlawful "(a) *[t]o refuse to sell or rent ... or otherwise make unavailable or deny*, a dwelling to any person because of ... religion .... [or] (b) [t]o discriminate against any person in the terms, conditions, or privileges of *sale or rental of a dwelling, or in the provision of services or facilities in connection therewith,* because of ... religion...." 42 U.S.C. § 3604(a), (b) (emphases

added). However, the FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant's religion. *See* 42 U.S.C. § 3604(a)-(e). In summary, the FHA forbids those practices that make housing unavailable to persons on a discriminatory basis as well as discriminatory terms and conditions with respect to housing that is provided.

An FHA plaintiff may proceed on a theory of disparate intent or disparate impact. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir.1995). Therefore, in order to state an FHA claim, plaintiffs must allege either that Yale adopted an identified policy that denied them housing or granted them housing on discriminatory terms and conditions for reasons that were, in significant part, discriminatory or that the identified policy although adopted for neutral reasons has a discriminatory impact on the availability of housing for Orthodox Jews or the terms and conditions on which the housing is offered.

In judging whether the students stated a claim under either a disparate treatment or a disparate impact theory, we must "look only to the allegations of the complaint[,] ... assume all well-pleaded factual allegations to be true, and ... view all reasonable inferences that can be drawn from such allegations ... in the light most favorable to the plaintiff[s]." *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir.1999) (internal citation omitted). We must find these allegations to be sufficient "unless it appears beyond doubt that [the students] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This rule applies with special force to claims of civil rights violations. *See Easton v. Sundram*, 947 F.2d 1011, 1015 (2d Cir.1991). Moreover, we may not affirm the dismissal of the students' complaint because they have proceeded under the wrong theory "so long as [they have]

alleged facts sufficient to support a meritorious legal claim." *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 45-46 (2d Cir.1997). However, plaintiffs must plead the requisite facts. *See, e.g. Davidson v. Flynn*, 32 F.3d 27, 31 (2d Cir.1994) (dismissing prisoner's procedural due process claim because he failed to allege particular due process violations).

Our first and most difficult task is identifying the practice that the students attack. According to the dissent, plaintiffs allege "that a facially neutral housing policy makes housing effectively unavailable to Orthodox Jews." [Dissent at 22a.] Starting with this premise, the dissent finds that plaintiffs have stated a disparate impact claim under the Fair Housing Act. Although plaintiffs certainly allude to the allegedly discriminatory impact of Yale's lack of parietal rules, these allusions must be considered in light of the relief they requested. Plaintiffs do not ask us to force Yale to implement more conservative rules. Rather, they request only the following relief on their FHA claims: (1) "a declaratory judgment that Yale's policy of refusing to grant religion-based exemptions to its on-campus housing requirement, as applied and implemented by the defendants, unconstitutionally burdens the free exercise of religion, discriminates against and on the basis of religion, and ... that it therefore violates 42 U.S.C. § 3604"; (2) an injunction prohibiting the defendants "from enforcing, in the future, Yale's mandatory on-campus housing policy against students who cannot reside in such housing because of their religious convictions"; and (3) an order directing Yale to reimburse the plaintiffs for housing charges they paid under duress. These requests place the otherwise skeletal factual allegations of the amended complaint in perspective.

Of the three paragraphs in the FHA claim itself, the first merely incorporates by reference certain preceding factual allegations, and the second describes the applicable

provisions of the FHA. Only the third paragraph describes plaintiffs' theory of liability. It states:

> By requiring the plaintiffs to pay for and live in rooms in co-educational residential colleges, despite the plaintiffs' religious objections to the sexual immodesty prevalent in Yale's dormitories, and by refusing to accommodate the plaintiffs' religious obligations, the defendants have discriminated against the plaintiffs, because of their religion, in the terms and conditions of a rental of a dwelling and in the provision of housing, in violation of the Fair Housing Act.

Am. Compl. § 99. Among the incorporated factual allegations arguably relevant to the FHA claim is the students' contention that Yale allows other freshmen and sophomores to reside off campus for reasons such as age or marital status but refuses to allow an exception to its policy for religious reasons. Each of the four student plaintiffs requested a waiver of the requirement that they live on campus. In addition, the students claim that Orthodox Judaism prohibits "touching members of the opposite sex other than one's immediate relatives or spouse [and] living in a situation in which a person would have regular or repeated exposure to members of the opposite sex undressed or dressed immodestly." Am. Compl. § 57. Finally, they claim that their counsel and "[v]arious third parties" have asked Yale to make unspecified reasonable accommodations to their beliefs or to grant them waivers, but Yale has refused. Am. Compl. §§ 67-68. Plaintiffs do not ascribe any particular motivation to Yale's original requirement that freshmen live on campus but claim that Yale expanded the requirement to sophomores for the 1995-96 academic year "because it determined that too many Yale students were moving off campus, thereby reducing Yale's revenues from housing charges to students." Am.Compl. § 55. Although

the factual allegations do not specify clearly the policies plaintiffs attack or the accommodations they requested, the relief demanded makes it clear that the policy plaintiffs claim violates the FHA is the defendants' refusal to exempt them from housing that they view as immoral. Plaintiffs request, pursuant to the FHA, the right to be excluded from housing, not the right to have on-campus housing that does not unduly burden their beliefs. Significantly, plaintiffs do not claim that defendants adopted their policy because of animus toward Orthodox Jews or that they grant exemptions to other religious groups or to students lacking a religious affiliation in a manner different from the exemption process for Orthodox Jews. Because plaintiffs seek exclusion from housing and not inclusion, they do not state an FHA claim. The purpose of the FHA is to promote integration and root out segregation, not to facilitate exclusion. *See Trafficante*, 409 U.S. at 211, 93 S.Ct. 364; *Town of Huntington*, 844 F.2d at 936. Because the complaint alleges neither intent to discriminate, nor a facially discriminatory policy, nor facts necessary to constitute disparate impact discrimination, nor even that the plaintiffs were excluded from housing, we believe sections 3604(a) and (b) cannot be stretched to cover plaintiffs' claim that the FHA gives them a right to be excluded from Yale housing. Thus, based on our reading of the complaint, we would affirm the district court's dismissal of plaintiffs' FHA claims.

Nevertheless, we also examine the interpretations of the complaint advanced in the plaintiffs' and amici's briefs and in the dissent. First, relying principally on *LeBlanc-Sternberg*, the students argue that Yale's policy of requiring all unmarried freshman and sophomores under the age of twenty-one to reside on campus coupled with "the current absence of any traditional, reasonable parietal rules" violates the FHA because it effectively prevents them from access to Yale housing. Pls.' Br. at 37. Our dissenting colleague believes that plaintiffs have an actionable disparate impact

claim based on this theory. In *LeBlanc-Sternberg*, we--among other things--reversed a district court order setting aside an FHA jury verdict in favor of a group of Hasidic Jews and against the village of Airmont. *LeBlanc-Sternberg*, 67 F.3d at 424. The village had adopted a zoning code that arguably prohibited the use of home synagogues, which were necessary for the religious practice of Orthodox Jews. *Id.* at 417-20. We concluded that "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, [and] *that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews." Id.* at 431 (emphasis added). The students, in contrast, do not allege any facts from which a discriminatory intent could be inferred, do not argue that defendants had a discriminatory intent, and, in fact, describe Yale's motive as economic. Because *LeBlanc-Sternberg* involved intentional discrimination, it does not support the plaintiffs' position.

Nor have the students adequately pleaded that Yale's facially neutral policy had a discriminatory impact. We apply Title VII disparate impact analysis to FHA claims. *See Town of Huntington*, 844 F.2d at 934 (applying Title VII analysis to public defendant); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir.1998) (applying *Huntington* to private defendant). A "prima facie case is established by showing that the challenged practice of the defendant 'actually or predictably results in racial discrimination.' " *Town of Huntington*, 844 F.2d at 934 (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir.1974)). In order to state a *prima facie* claim the students must allege a "causal connection between [a] facially neutral policy ... and the resultant proportion of minority" group members in the population at issue. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir.1998). The students do not allege that Yale's policy has resulted in or predictably will result in under-representation of Orthodox

Jews in Yale housing. Therefore, their claim fails. *See Brown*, 163 F.3d at 712; *Town of Huntington*, 844 F.2d at 934. We cannot read into their complaint the missing allegations crucial to a disparate impact claim because a Rule 12(b)(6) motion tests the adequacy of the complaint, *see Dangler*, 193 F.3d at 138, not the briefs. Moreover, plaintiffs, who are represented by able and experienced counsel, filed one amended complaint and did not move to further amend when confronted with defendants' motion.

Plaintiffs' second theory of liability is that Yale impermissibly discriminated against them on the basis of religion because it has a "policy of granting *ad hoc* and other exemptions and accommodations for secular reasons, but not for religious reasons." Pls.' Br. at 38. Nowhere in their complaint do plaintiffs allege that Yale has a system of "*ad hoc*" exemptions. Although they refer loosely to the granting of exemptions "for reasons other than religious conviction and belief," Am. Compl. § 4, the only other reasons identified are age (over 21) and marital status. These exemptions apply to Orthodox Jews just as they apply to other students. However, even assuming that plaintiffs alleged the widespread grant of "*ad hoc*" exemptions, they would not have stated a claim under the FHA. As we previously discussed, one relevant section of the FHA contemplates a challenge to a denial or refusal of housing and the other relevant section contemplates a challenge to discriminatory terms or conditions offered with respect to housing that is provided or offered. Plaintiffs' allegation that defendants refused to grant them exemptions does not come within either of these sections because they do not allege that Yale's refusal was based on intent to discriminate, was a facially discriminatory policy, constituted disparate impact discrimination by resulting in an under-representation of Orthodox Jews in Yale housing, or even caused them to be denied housing. Therefore, we affirm the district court's dismissal of the students' FHA claim. Having affirmed the

dismissal of all of plaintiffs' federal claims, we also affirm the dismissal of plaintiffs' state law claims for lack of supplemental jurisdiction.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

MORAN, *Senior District Judge*, dissenting in part.

Before explaining why I must respectfully dissent from my colleagues' conclusion that plaintiffs have failed to state a claim under the Fair Housing Act, it is worth putting the students' claim in context. Yale has provided plaintiffs with rooms on the same basis as other students. In so doing, it differs from private landlords generally because it can and does require that the students rent the rooms. There are some exceptions to this policy. Married students, those over 21, and those who have completed their freshman and sophomore years are not required to live in the dormitories. According to the complaint, Yale claims that living in college dormitories is "integral" to a Yale education (at least for younger and unmarried freshmen and sophomores). Nonetheless, plaintiffs are not required to occupy the rooms they lease; they must simply pay for them. This fact, according to the students, reveals that the residency requirement stems, at least in part, from Yale's need to generate revenue from its student housing. Am. Compl. § 55. Plaintiffs seek reimbursement for their redundant housing costs and, going forward, an order exempting them from the mandatory on-campus housing policy. This relief is necessary, they allege, because attempts to find alternative

on-campus, single-sex housing accommodations were unsuccessful. Am. Compl. §§ 67-68.

I tend to agree that Yale's parietal rules are not what Congress had in mind when it originally enacted the Fair Housing Act. But that is not a basis for ruling, as RICO well illustrates. *See National Organization for Women v. Scheidler*, 510 U.S. 249, 262, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) (" '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' ") (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)) (other citations omitted). Although the relevant standards for a disparate impact claim under the Fair Housing Act are, at the moment, rather fluid[3], there is ample authority to conclude that the complaint states a claim under sections 3604(a) and (b) of the FHA. Plaintiffs allege that a facially neutral housing policy makes housing effectively unavailable to Orthodox Jews, while the terms of that policy impose an additional financial burden on the basis of plaintiffs' religion. Plaintiffs further allege, in so many words, that Yale has unreasonably refused to adopt an alternative housing policy that would provide a comparably effective means of meeting the defendants' educational objective without imposing significant additional costs. Although these allegations are obscured by the morass of historical data directed toward a finding of state action, the

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[3] *See* Peter E. Mahoney, *The Ends of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409 (1998) (identifying factors which allowed competing disparate impact standards to develop); Thomas P. Vartanian, Robert H. Ledig, and Alisa Babitz, *Disparate Impact Discrimination: Fair Lending at a Crossroads*, 49 Consumer Fin. L.Q. Rep. 76 (1995) (noting the absence of a uniform standard of proof for housing-related disparate impact claims); Kristopher E. Ahrend, *Effect, or No Effect: A Comparison of Prima Facie Standards Applied in "Disparate Impact" Cases Brought Under the Fair Housing Act (Title VIII)*, 2 Race & Ethnic Ancestry L. Dig. 64 (1996).

necessary components of a disparate impact claim are surely present in the complaint.

Defendants seek to avoid the disparate impact theory of liability by contending, incorrectly, that discriminatory animus must be alleged to maintain a claim under § 3604(a). Def. Br. at 38. Distinguishing the result in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir.1995), the defendants, and now the majority, emphasize the "jury's implicit finding" in that case of some discriminatory intent lurking behind the challenged zoning ordinance. This argument is merely a strawman, for our cases, present and precedent, and those of our sister circuits make it quite clear that discriminatory animus need not be shown by plaintiffs proceeding under a theory of discriminatory effect.

In truth, the students rely on *LeBlanc-Sternberg* for the proposition that a wide variety of housing practices may create an injury cognizable under the FHA. Indeed, our opinion today confirms that the economic penalty imposed on devout Orthodox Jews subject to Yale's housing policy is sufficient to confer standing under the statute. I see no justification for demanding a more specific form of injury (*i.e.*, the rejection of an application for housing) or a particular form of relief (*i.e.*, "inclusion") in order for plaintiffs to meet the minimum pleading threshold. It is enough that defendants have allegedly imposed conditions on the acquisition of housing such that ostensibly available housing is effectively unavailable to a protected group. Given the liberality of pleading requirements under the federal rules,[4] I would remand the case for a decision on the merits of plaintiffs' claims under the Fair Housing Act.

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[4] On this point, see especially Judge Cabranes' opinion in *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 45-46, 39 Fed.R.Serv.3d 492 (2d Cir.1997) (confirming that a litigant's failure to cite the correct statutory section does not require the court to affirm the dismissal of her complaint so long as she has alleged facts sufficient to support a meritorious legal

A. *The Disparate Impact Framework*

In order to evaluate whether plaintiffs have advanced a colorable claim under the Fair Housing Act, it is helpful to briefly examine the sources for and status of the relevant substantive standards for such a claim. For better or worse, we have hitched the Fair Housing Act to that itinerant alpha statute, Title VII of the Civil Rights Act of 1964. *See Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.) (adopting the burden-shifting approach from Title VII employment discrimination cases and concluding that effect alone is sufficient to establish the prima facie case), *aff'd*, 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (affirming judgment); *Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214, 1227 (2d Cir.1994) (confirming that Title VII framework provides the best model for disparate impact claims under the FHA, and collecting cases); *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739, 745 n. 1 (9th Cir.1996); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1456 n. 4 (10th Cir.1993); and *see Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir.1996) (observing

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claim), as well as *Albert v. Carovano*, 851 F.2d 561, 571 n. 3 (2d Cir.1988) (en banc) (citing *Newman v. Silver*, 713 F.2d 14, 15 n. 1 (2d Cir.1983)); *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir.1991) ("[Defendant] ... point[s] out that [plaintiff] failed to plead the third party beneficiary theory in his complaint. To this, we simply respond that federal pleading is by statement of claim, not by legal theory."); *Michael v. Clark Equip. Co*, 380 F.2d 351, 352 (2d Cir.1967); *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 21 (2d Cir.1982); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir.1992) (complaint does not have to state a legal theory and specification of an incorrect theory is not fatal); *Sidney S. Art Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir.1994) ("The district court has a duty to consider whether a plaintiff's allegations could provide relief under any available legal theory."); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990 & Supp.1979) ("any legal theory").

that Title VII standards have "undergone several transformations in recent years").

The disparate impact path begins, of course, with *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in which the Supreme Court recognized that Title VII provides a remedy not only for "overt discrimination but also [for] practices that are fair in form, but discriminatory in operation." Under *Griggs*, a facially neutral employment practice which imposes a racially disproportionate burden on job applicants may violate Title VII even absent an intent to discriminate. This is so, the Court surmised, because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432, 91 S.Ct. 849 (emphasis added). The enduring elements of disparate impact litigation have their source in the language of the Court's opinion:

> What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.... The touchstone is *business necessity*. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.... Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Griggs, 401 U.S. at 432, 91 S.Ct. 849 (emphasis added).

Later, however, in a series of significant decisions culminating in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), the Supreme Court redirected disparate impact analysis away from the principles voiced in *Griggs*. *See Albemarle Paper*

Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). During this period, the Court recharacterized the relevance of a defendant's intent, *Wards Cove*, 490 U.S. at 660, 109 S.Ct. 2115; shifted the burden of persuasion entirely to the plaintiff, *id.* at 659-600, 109 S.Ct. 2115; and relaxed the employer's obligation to prove the challenged practice was a "business necessity," *id.* at 659, 109 S.Ct. 2115.

After two years of intense dialogue about antidiscrimination policy approaches, much lobbying and political posturing, a presidential veto in 1990, innumerable amendments and revisions, and high level negotiations between congressional leaders and the Bush White House[5], Congress passed the Civil Rights Act of 1991 ("Civil Rights Act"), Pub.L. 102-166, 105 Stat. 1071, codifying certain developments and reversing others in an effort to shore up Title VII's protections for victims of discrimination.[6] Key provisions of the Civil Rights Act and the only official legislative history pointedly reject several of the *Wards Cove* modifications. Various amendments confirmed that disparate

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[5] See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between Rhetoric and the Content of the Civil Rights Act of 1991*, 46 Rutgers L.Rev. 1 (1993), for a detailed analysis of the complex judicial, political, and legislative events which led to the passage of the Civil Rights Act.

[6] "The Congress finds that ... the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, ... has weakened the scope and effectiveness of Federal civil rights protections; and ... legislation is necessary to provide additional protections against unlawful discrimination in employment." Civil Rights Act of 1991, Pub.L. 102-166 § 2(2) and (3) (1991).

impact claims are distinct from those alleging intentional discrimination[7]; reallocated the burdens of proof[8]; and

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[7] *See* Pub.L. 102-166, § 102 (1991), 105 Stat 1071, 1072, codified at 42 U.S.C. § 1981a(a)(1) (distinguishing "intentional discrimination" from an "employment practice that is unlawful because of its disparate impact").

[8] *See* Pub.L. 102-166, § 105 (1991), 105 Stat 1071, 1074, codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i), which provides, in relevant part:

> Sec 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.
>
> (a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C.2000e-2) is amended by adding at the end the following new subsection:
>
> "(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if--
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

restored the substantive elements of a disparate impact claim to their pre-*Wards Cove* formulations.[9] Under the amended

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(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title...."

(3)(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*--Business necessity/cumulation/ alternative business practice."

[9] The "Purposes" section of the Civil Rights Act establishes that it was intended "(2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)." Pub.L. 102-166, § 3(2) (1991). The "Findings" section states that "(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment." Pub.L. 102-166, § 2(2) and (3) (1991). The Act further provides that it was passed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Pub.L. 102-166, § 3(4) (1991).

statute, once a plaintiff has made the prima facie showing of disparate impact, the burden shifts to the defendant to demonstrate[10] that the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

As to the substantive standards, the Purposes section provides that the Act was intended to

> codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

Pub.L. 102-166, § 3(2) (1991). The problem is that scholars and courts disagree as to what standards Congress intended to codify. *Compare Michael Carvin, Disparate Impact Claims Under the New Title VII*, 68 Notre Dame L.Rev. 1153 (1993) (arguing that *Wards Cove* is still good law after The Civil Rights Act); with Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 Harv. L.Rev. 896 (1993) (asserting that *Wards Cove* does not survive the Act); Susan Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 Ga. L.Rev. 387 (1996) (arguing for a strict business necessity standard under the Act). Essentially, the competing interpretations turn on whether one views *Wards Cove* as consistent with and the inevitable result of earlier Supreme Court opinions, or whether the decision represented a significant departure from

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[10] If there was any remaining question as to the extent of the parties' respective burdens, 42 U.S.C. § 2000e(m) establishes that the term "demonstrates" is defined to mean "meets the burdens of production and persuasion."

Griggs and its progeny. The language of the statute successfully succumbs to either interpretation.

The Act's ambiguous language, however, while apparently necessary to sustain a fragile congressional compromise[11], has allowed a number of contradictory standards to emerge. *Compare Banks v. City of Albany*, 953 F.Supp. 28 (N.D.N.Y.1997), with *U.S. v. State of N.C.*, 914 F.Supp. 1257 (E.D.N.C.1996). Further muddying current authority is the fact that a number of recent disparate impact cases have addressed claims to which the Act did not retroactively apply[12], and it has not always been obvious whether courts are deciding claims based on pre-Act case law or new statutory standards. *See, e.g., E.E.O.C. v. Joint Apprenticeship Committee of the Joint Industry Board of the Electrical Industry*, 186 F.3d 110, 120 (2d Cir.1999) (allocating burdens of proof according to pre-Civil Rights Act case law); *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 n.5 (1st Cir.1995) (deciding disparate impact claim based on pre-Act standards).

Finally, although there is now consensus that Title VII standards govern claims under Title VIII[13], it has not always been easy to translate principles designed to regulate employment relations into the realm of public and private housing. For instance, "job performance" may be more closely related to employment qualifications than "tenant performance" is to rental criteria. *See Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3rd Cir.1977) (observing that

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[11] *See Govan*, supra n. 3, 46 Rutgers L.Rev. at 236-239.

[12] *See Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (rejecting retroactive application of Civil Rights Act provision); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 301-05, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) (same).

[13] *See Huntington*, 844 F.2d at 934, 936.

the error cost is higher in the employment realm); *Huntington*, 844 F.2d at 936 (noting the absence in Title VIII cases of a single objective akin to job performance). There are analogous, but not identical concerns at issue; just as there are analogous, but not identical provisions in the antidiscrimination statutes.

The toughest challenge is "to translate a body of precedent that simultaneously is undergoing rapid evolution."[14] Mahoney, *supra* n.1, at 419. Because the nature of cases under the Fair Housing Act varies dramatically--from landlord/tenant disputes to Section 8 housing participation, from lending practices to urban zoning conflicts--this translation is best accomplished piece by piece, but with an eye toward the development of a coherent methodology. This case presents a new set of facts over which the evolving Title VIII framework should be laid. It

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[14] There is no statutory provision which requires that we update FHA housing discrimination standards every time Title VII undergoes revision. There are several reasons, however, which make it advisable to keep the two regimes in step: (1) identical statutory foundations and recent legislative history indicate a congressional intention to maintain parallel frameworks; (2) both statutes share the same broad remedial and preventive goals; (3) it is more efficient to adapt Title VII standards than to begin from scratch; and (4) rule of law values are well served by making the link explicit and clearly specifying relevant exceptions. *See Vartanian*, *supra* n.1, at 80 (outlining arguments for and against the applicability of new Title VII law to housing discrimination); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3rd Cir.1977) (noting identical "because of race" provisions and Supreme Court's instruction to "construe both Title VII and Title VIII broadly so as to end discrimination"); Elliot M. Mincberg, Note, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.--C.L. L.Rev. 128, n. 103 (1976) (discussing statutory parallels); Mahoney, *supra* n.1, at 448 (noting congressional reference to "business necessity" test in recent amendments to the Fair Housing Act).

may be that plaintiffs have no remedy, but their claim should be allowed to proceed through discovery toward a resolution on the merits.

B. *The History of Disparate Impact Claims under the FHA*

The contours of disparate impact analysis under the FHA have been shaped in large part by the Title VII developments addressed above. The Eighth Circuit in 1974 was the first to recognize the validity of a disparate impact claim under the Fair Housing Act. *See U.S. v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir.1974). Although the court crafted its test based on equal protection cases--authority invalidated shortly thereafter by *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)[15] --the existence of a disparate impact claim under Title VIII was implicitly confirmed when the Supreme Court announced its decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (Arlington Heights), 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). *See Rizzo*, 564 F.2d at 146; Mahoney, supra n. 3 at 431-432 (discussing implications of unique procedural posture in *Arlington Heights*). In *Arlington Heights*, a non-profit housing developer and several of its potential low--and moderate-income tenants brought suit alleging that the city's failure to re-zone a 15-acre parcel from single-family to multiple-family classification constituted illegal housing

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[15] Under the *Black Jack* formulation, "[o]nce the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest." *Black Jack*, 508 F.2d at 1188 & n. 4 (citing as authority "cases involving equal protection challenges to statutes or ordinances creating 'suspect classifications,' "including *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)). *See Mahoney, supra* n.1, at 427-430.

discrimination under the Fourteenth Amendment and the Fair Housing Act. After dismissing plaintiffs' equal protection claims based on the lower courts' conclusion that the zoning board had not acted with a discriminatory purpose, Arlington Heights, 429 U.S. at 270-271, 97 S.Ct. 555, the Court remanded the case to the Seventh Circuit for consideration of plaintiffs' disparate impact claims under Title VIII, *id.* at 271, 97 S.Ct. 555.

On remand, the Seventh Circuit identified four factors to be evaluated in assessing whether conduct which produces a discriminatory impact will violate § 3604(a) of the FHA: (1) the strength of plaintiff's showing of discriminatory effect, (2) whether there is some evidence of discriminatory intent even if insufficient to satisfy the constitutional standards of *Washington v. Davis*, (3) the defendant's interest in taking the challenged action, and (4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Metropolitan Housing Development Corp. v. Arlington Heights* (*Arlington Heights II*), 558 F.2d 1283, 1290 (7th Cir.1977).

The Third Circuit took a different route. Relying on the Supreme Court's decision in Arlington Heights, the court held that proof of discriminatory effect alone would satisfy the prima facie burden for disparate impact claims under the FHA. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3rd Cir.1977). The *Rizzo* court then adapted the Griggs elements to the housing context. The court concluded that defendant's rebuttal case is established if the practice is shown to "serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and ... that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* at 149. If the

defendant introduces evidence that no such alternative course of action could be adopted, the Third Circuit specified that the burden would once again shift to the plaintiff to demonstrate that other such practices are available.

Building upon *Arlington Heights II's* "four-factor" approach or Rizzo's "effect-only" standard and borrowing from the growing body of Title VII case law, other circuit courts began to formulate distinct tests for disparate impact claims under the FHA. *See* Ahrend, *supra* n.1, (discussing the unresolved conflict among the circuit courts). Most circuits rejected the *Arlington Heights II* formulation to the extent that it examined the defendant's intent as a component of the prima facie case. If effect alone was sufficient under *Griggs*, it was also sufficient for claims under the FHA. *See Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir.1984) (holding that effect alone is sufficient to establish a prima facie case under the FHA); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 576 (6th Cir.1986) (rejecting *Arlington Heights II's* inclusion of intent as a factor, but adopting the other three); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir.1987) ("[T]he consensus is that a plaintiff need prove only discriminatory effect, and need not show that the decision complained of was made with discriminatory intent.").

In Huntington Branch, *N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir.1988), we considered a challenge to a suburban zoning ordinance which restricted the development of multi-family housing projects to a largely minority "urban renewal area." The *Huntington* court's decision set forth the test that has continued to govern disparate impact FHA claims in this circuit. Relying on *Rizzo* and Title VII case law we held that the prima facie case is established by showing that the challenged practice "actually or predictably results in racial discrimination; in other words that it has a discriminatory effect." *Id.* at 934.

Following *Griggs*, we emphasized that the plaintiff need not show that the housing decision was made with discriminatory intent. To require otherwise, we concluded, "would strip the statute of all impact on de facto segregation." *Id.* at 934-35. Once a plaintiff established the prima facie case, Huntington required the defendant to "prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[16] *Id.* at 936.

Huntington rejected the inclusion of *Arlington Heights II's* four factors as components of the prima facie case. "Employing the test in *Arlington Heights II* as a prima facie hurdle would cripple Title VIII." *Id.* at 934. Instead, the court determined that the three factors adopted in *City of Toledo* (as well as any evidence of intent) are relevant for "the ultimate determination on the merits." *Id.* at 936. According to *Huntington*, in order to adjudge "the ultimate balance," the district court must assess whatever justifications the town advances and weigh them carefully against the degree of adverse effect shown by the plaintiff.

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[16] As discussed above, the Huntington formulation was tailored to suit claims against a public defendant. Courts applying the test to private defendants have merely omitted the word "governmental." See, *e.g.*, *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir.1998) (defendant must "prove that its actions furthered, in theory and in practice, a legitimate, bona fide ... interest and that no alternative would serve that interest with less discriminatory effect"); *U.S. v. Salvation Army*, 1999 WL 756199, (S.D.N.Y. Sept. 24, 1999) (same); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F.Supp. 148, 154 (S.D.N.Y.1989) (stating that the "burden shifts to the defendants to present bona fide and legitimate justifications for their policies"). We agree with the Fourth Circuit's observation in *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988-989 n. 5 (4th Cir.1984), however, that the test for public defendants is not directly applicable to private defendants. *See Mahoney, supra* n.1, at 449.

Id. Even "substantial" interests in the housing policy "cannot, consistently with Title VIII, automatically outweigh significant disparate effects." *Id.* at 937. Although Huntington's adherence to the Title VII burden shifting approach remains vital, *see Salute v. Stratford Greens Garden Apartments*, 136 F.3d at 312 (Calabresi, J. dissenting), the court's final "balancing of interests" should be revisited in light of the statutory codification of disparate impact analysis in the Civil Rights Act of 1991. *See Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir.2000).

C. *Relevant Burdens of Proof for Disparate Impact Claims under the Fair Housing Act*

1. The Prima Facie Case.

A prima facie case of disparate impact housing discrimination is established by showing that a particular facially-neutral practice actually or predictably imposes a disproportionate burden upon members of the protected class. *See Huntington*, 844 F.2d at 934; *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49-50 (1st Cir.2000); *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739 (9th Cir.1996); *Orange Lake Associates, Inc., v. Kirkpatrick*, 21 F.3d 1214, 1228 (2d Cir.1994). To sustain a disparate impact claim under § 3604(b), plaintiffs must show that the challenged practice had an adverse impact on members of the protected class with respect to the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith. Under § 3604(a), plaintiffs must show that the challenged practice disproportionately excluded members of a protected group from a dwelling or from services or facilities connected

therewith.[17] Discriminatory intent need not be shown. *Huntington*, 844 F.2d at 935; *Langlois*, 207 F.3d at 49-50; *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir.1987). Nor should plaintiffs be required to address the other *Arlington Heights II* factors which some circuits have included in the prima facie case. *See Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d 1243 (10th Cir.1995); *Arthur v. Toledo*, 782 F.2d 565, 575 (6th Cir.1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir.1982); *Snyder v. Barry Realty Inc.*, 953 F.Supp. 217, 220 (N.D.Ill.1996).[18]

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[17] Contrary to Yale's assertion, plaintiffs need not make the specific prima facie showing accepted in *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-38 (2d Cir.1979), and echoed in *Soules v. U.S. Dept. of Housing & Urban Development*, 967 F.2d 817 (2d Cir.1992). In *12 Lofts*, Robinson had alleged that he was the victim of a discriminatory denial of housing because of his race. Analogizing to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the court allowed plaintiff to establish his prima facie case by proving that he was black; that he applied for and was qualified to rent or purchase the housing; that he was rejected; and that the housing opportunity remained available. The court made clear that the evidence went far beyond establishing merely a discriminatory effect and readily permitted an inference of racially discriminatory motivation. Similarly, the court in Soules was reviewing an ALJ's determination with respect to a discriminatory denial of housing. Although the court included confirmation that an allegation of discriminatory effect is sufficient to state a claim under the Act, it is clear that the court was analyzing defendant's claim of discriminatory treatment, i.e. intentional discrimination. *Soules*, 967 F.2d at 821-22.

[18] Recent decisions within the Seventh Circuit have begun to question whether the *Arlington Heights II* factors were intended to represent a prima facie hurdle. *See Hispanics United of DuPage County v. Village of Addison*, Ill., 988 F.Supp. 1130, 1153 (N.D.Ill.1997) (agreeing with Huntington that "treating the four factors as steps necessary to make out a prima facie case places too onerous a burden on [plaintiffs]"); *Cabrini-Green Local Advisory Council v. Chicago Housing Auth.*, 1997 WL 31002, (N.D.Ill.1997) (concluding that four-factor test set out in

Indeed, in the housing context, it may often be the case that parties stipulate that a prima facie case (satisfying the elements of particularity, impact, and causation) has been established. *See Pfaff*, 88 F.3d at 746. The housing practices at issue are not likely to be part of a complex scheme of tests and qualifications and the adverse impact may be immediately apparent.

2. *The Business Justification*

As the First Circuit pointed out in *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49-50 (1st Cir.2000), not every policy causing a disparate effect is unlawful. "[A] vast array of measures, from war-making and the federal budget to local decisions on traffic and zoning, may have a disparate impact. Thus, practically all of the case law, both in employment and housing, treats impact as doing no more than creating a prima facie case, forcing the defendant to proffer a valid justification.... Indeed, while Congress's amendment of the law after *Wards Cove Packing Co. v. Atonio* ... stiffened the employer's burden of justification, it left intact the principle that disparate impact merely creates a prima facie case." *Langlois*, 207 F.3d at 49-50. Thus, once a prima facie case of adverse impact is established, the inquiry turns to whether the defendant can nonetheless avoid liability by defending the practice. *Huntington*, 844 F.2d at 936.

In the employment context, once a Title VII plaintiff has made out a prima facie case of disparate impact, the Civil Rights Act of 1991 shifts the burden of proof to the defendant, who must show that the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see*

Arlington Heights II "is more properly applied to a motion for summary judgment or by the fact finder at trial").

Lanning v. Southeastern Pennsylvania Transp. Auth. (SEPTA), 181 F.3d 478, 485 (3rd Cir.1999), *cert. denied*, 528 U.S. 1131, 120 S.Ct. 970, 145 L.Ed.2d 840 (2000). As discussed above, the concepts of "business necessity" and "job related" are undefined in the statute, but "are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)." Civil Rights Act, § 3(2) (1991); Interpretive Memorandum, 137 Cong. Rec. 28,680 (1991). As Judge Torres observed in *Donnelly v. Rhode Island Board of Governors for Higher Education*, 929 F.Supp. 583 (D.R.I.1996), *aff'd.* 110 F.3d 2 (1st Cir.1997), "consistent with" and "necessity" connote discordant ideas.

> Two things are consistent with one another if they are in harmony as opposed to being in conflict. On the other hand, something is a necessity if it is required or compelled. Since § 2000e-2(k)(1)(A)(i) uses these terms conjunctively, it is not clear whether Congress intended the standard to be that adherence to the challenged practice is required to conduct the employer's business; that the practice is closely related to a legitimate business purpose; or something in between.

Id. at 593 (citations omitted).

Cobbling together the relevant statutory provisions, it appears that the phrase "consistent with business necessity" is shorthand for "consistent with the pre-*Watson/Wards Cove* conception of 'business necessity." The *Watson* plurality shifted the focus away from the employer's "need" for a particular practice because it is significantly correlated with

job performance[19] and toward the legitimacy of the employer's business goals and whether the practice indeed contributed to those ends. In rejecting the final stages of this shift, Congress has required a Title VII defendant to justify not only the legitimacy of the ends, but also the necessity of the means. *Cf. Lanning*, 181 F.3d at 489; *Nash v. Consolidated City of Jacksonville, Duval County, Fla.*, 895 F.Supp. 1536, 1545 (M.D.Fla.1995) ("[T]he Civil Rights Act of 1991 ... restor[ed] pre-Wards Cove law in which, *inter alia*, ... 'business necessity' really means 'necessity.' "), *aff'd*, 85 F.3d 643 (11th Cir.1996).

Judge Torres concluded that the "business necessity" test evaluates whether the practice is "reasonably necessary to achieve an important business objective." Donnelly, 929 F.Supp. at 593. Other courts have reached similar formulations. *See Banks v. City of Albany*, 953 F.Supp. 28, 35 (N.D.N.Y.1997) ("[T]he defendant must show that the challenged action is demonstrably necessary to meet an important business goal."); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir.1993) (defendant must show "that the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal for Title VII purposes"); *Mountain Side*, 56 F.3d at 1254 ("[T]he burden shifts to the defendant to produce evidence of a 'genuine business need' for the challenged

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[19] *See, e.g., Albemarle*, 422 U.S. at 431, 95 S.Ct. 2362 (holding that "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which are relevant to the job or jobs for which candidates are being evaluated' "); *Dothard*, 433 U.S. at 332 n. 14, 97 S.Ct. 2720 (indicating that "a discriminatory employment practice," such as a discriminatory cutoff score on an entry level exam, "must be shown to be *necessary* to safe and efficient job performance to survive a Title VII challenge").

practice.") (*citing Griggs*, 401 U.S. at 432, 91 S.Ct. 849); *see also Pfaff*, 88 F.3d at 747 & n.3 (rejecting application of "compelling business necessity" formulation). The *Donnelly* formulation is a fair reflection of the mandate of the Civil Rights Act of 1991 and is compatible with the relevant considerations attendant to a fair housing claim.

3. *Alternative Practices Showing*

If the defendant can show that the practice was reasonably necessary to achieve an important business objective, the plaintiff will prevail only if he or she can prove that the defendant unreasonably refused to adopt an alternative housing practice that would serve the defendant's legitimate objective with less discriminatory impact. *See Albemarle*, 422 U.S. at 425, 95 S.Ct. 2362; 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C). Factors such as the cost or other burdens of the proposed policy are relevant to a determination as to whether the defendant's refusal to adopt an alternative housing procedure was reasonable. *See Watson*, 487 U.S. at 998, 108 S.Ct. 2777. If plaintiffs have suggested another policy which would serve the defendant's legitimate objectives but would also add significant new costs or create tremendous upheaval or seriously undermine other legitimate objectives, a refusal to accept the alternative will not be viewed as unreasonable.[20] If, on the other hand, the alternative housing practice would be comparably effective without imposing significant new burdens, the

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[20] Of course, " 'Courts are generally less competent than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit." *Wards Cove*, 490 U.S. at 660, 109 S.Ct. 2115.

defendant's refusal to adopt the practice will be deemed unlawful housing discrimination. Correspondingly, to qualify as "an alternative housing practice," the policy must be feasible, must be comparably effective in serving the landlord's legitimate business objective, and must not significantly exceed the cost or burden of the challenged practice. *Albemarle*, 422 U.S. at 425, 95 S.Ct. 2362; *Dothard*, 433 U.S. at 329, 97 S.Ct. 2720; *Fitzpatrick*, 2 F.3d at 1118.

It is also worth noting here that the alternative practices demonstration is not about pretext. Yes, evidence showing a policy's disparate impact can be evidence of intentional discrimination, but evidence of--or even an inference of--intentional discrimination is unnecessary to prevail on a claim of disparate impact. [21] In *Huntington*, we confirmed that a plaintiff need not show that the decision

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[21] Other courts have a different position on this issue. Judge Harold Greene of the District Court for the District of Columbia observed more than a decade ago that the relevance of a private landlord's intent

> is unfortunately not entirely clear from a reading of the decided cases. Several decisions are inconsistent with each other; others are incomplete in significant respects; and still others do not distinguish between the relevant concepts. While, to be sure, proof of discriminatory intent by the landlord seems everywhere to be regarded as establishing a violation of the statute, *see Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir.1984), there is a variety of opinion, usually not reconciled in any systemic fashion, whether a violation may also be predicated solely on proof that the landlord[']s actions had a discriminatory effect....

Brown v. Artery Org., Inc., 654 F.Supp. 1106, 1114 (D.D.C.1987). There is even less agreement today. In fact, the sands appear to be shifting even within the circuits. *See Ahrend*, *supra* n.1 (noting new standards floated in Third and Seventh Circuits).

complained of was made with discriminatory intent. 844 F.2d at 934. We noted that a refusal to require intent was entirely consistent with our previous cases, the congressional purpose behind Title VIII, related Title VII jurisprudence and practical concerns. *Id.* We also, therefore, rejected the lower court's holding that if the defendants articulated a legitimate, nondiscriminatory reason for their conduct, the plaintiffs would be required to show that the reason was a "pretext." *See Huntington*, 668 F.Supp. at 782, 787. We noted that the *McDonnell Douglas* test "is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here." *Huntington*, 844 F.2d at 939 (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)); *see also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 667, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (Stevens, J. dissenting) (pointing out that *McDonnell Douglas* provides the appropriate methodology to identify disparate treatment absent direct proof of intent).

Moreover, the 1991 Act clearly repudiates the "pretext" approach. It omits any mention of "pretext" and refers to disparate impact claims as distinct from those involving intentional discrimination. *See, e.g.*, 42 U.S.C. § 1981a(a)(1), as amended, regarding "Damages in cases of intentional discrimination in employment." The provision establishes that a defendant who "engaged in unlawful intentional discrimination (*not an employment practice that is unlawful because of its disparate impact*)" may be liable for compensatory and punitive damages under the subsection. *Id.* (emphasis added). By memorializing this distinction in the statutory text, Congress has rejected the notion, proposed by some commentators, that "the dominant purpose [of disparate impact theory] is preventing pretextual discrimination." *See George Rutherglen, Disparate Impact*

Under Title VII: An Objective Theory of Discrimination, 73 Va.L.Rev. 1297, 1315 (1987); *see also, Vartanian, supra* n.1, at 78 & n.15 (discussing defeat of the McCollum Amendment which would have required some proof of intentional discrimination before a creditor could be held liable for the disparate impact caused by a facially-neutral pattern or practice).

In sum, based on the recodification of disparate impact standards for Title VII claims and on the emerging case law interpreting those standards in the housing context, a plaintiff proceeding under the Fair Housing Act may prevail on a disparate impact claim, as opposed to one for intentional discrimination, only if (1) the plaintiff shows that the defendant employs a particular housing policy or practice that imposes a disproportionate burden on a protected group and (2)(a) the defendant fails to demonstrate that the challenged practice is reasonably necessary to achieve a legitimate business objective, or (b) the plaintiff proves that the defendant unreasonably refused to adopt an alternative housing practice that would provide a comparably effective means of meeting the defendant's objective without imposing significant additional costs.

D. *Adoption of Alternative Practices v. Accommodation*

In alleging liability under the Fair Housing Act, the students protest Yale's "refus[al] to accommodate the plaintiffs' religious obligations." Am. Compl. § 99. Their statement either misapprehends the law (as the majority believes), is a misnomer for the alternative practices requirement, or merely alludes to failed negotiations with the defendants. Again, it is helpful to examine the substantive provisions of the antidiscrimination statutes before assessing the adequacy of the pleading, for the burden imposed upon a private defendant by the "alternative practice" requirement is

necessarily less than "accommodation" unless the plaintiff meets certain statutory criteria.[22]

Congress has twice amended anti-discrimination statutes expressly to create an obligation to "accommodate" the unique characteristics of a protected class. Under Title VII there is a duty to accommodate an employee's religious practices; in the housing context there is a duty to accommodate an individual's "handicap."

1. *Accommodation under the FHAA*

In 1988, Congress passed the Fair Housing Amendments Act of 1988 ("FHAA"), Pub.L. 100-430, 102 Stat. 1619, amending 42 U.S.C. §§ 3601-3619, to extend the FHA's promise of equal opportunity in housing to individuals with handicaps. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 299-300 (2d Cir.1998). Under the new provisions, it is unlawful to "make unavailable or deny, a dwelling to any buyer or renter" or to "discriminate ... in the terms, conditions, or privileges or sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" because of a person's handicap.[23] 42 U.S.C. § 3604(f)(1) and (2). Part (3) of subsection (f) requires a landlord to make "reasonable accommodations" when "necessary to afford ... equal

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[22] The two concepts have on occasion been relied upon together without any real distinction. *See, e.g., Martin v. Constance*, 843 F.Supp. 1321 (E.D.Mo.1994).

[23] 42 U.S.C. § 3602(h) defines "handicap" as (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

opportunity [for a handicapped person] to use and enjoy a dwelling."42 U.S.C. § 3604(f)(3)(B). If the reasonable accommodations provision is triggered, a defendant may be required to incur "reasonable costs" to accommodate a plaintiff's handicap, "provided such accommodations do not pose an undue hardship or a substantial burden." *Salute*, 136 F.3d at 300 (quoting *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir.1995)).[24] The FHAA limits the duty to accommodate exclusively to meet the needs of handicapped individuals and says nothing regarding a duty to accommodate religious beliefs.

2. *Religious Accommodation under the Civil Rights Act of 1964*

Earlier, Congress added section 701(j) to the Civil Rights Act of 1964, *see* Pub.L. 92-261, § 2(7) (1972), codified at 42 U.S.C. § 2000e(j), "to illuminate the meaning of religious discrimination under the statute." *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 63 & n. 1, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986). The definitions section of Title VII was amended to provide that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Under this definition, an employee can bring suit under Title VII based on the theory that the employer's failure to accommodate the employee's religious expression constitutes actionable discrimination. *See Trans World*

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[24] Landlords are also obligated to permit reasonable modifications of the premises, although they need not pay for the alterations and certain conditions may be attached. 42 U.S.C. § 3604(f)(3)(A).

Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir.1996).

No such amendment has been made to the Fair Housing Act. Indeed, the term religion is not defined at all. *See Barlow v. Evans*, 993 F.Supp. 1390 (D.Utah 1997) (considering whether prohibition of religious discrimination in provision of housing provides protection for polygamist). While it may generally be appropriate to look to the definitions contained in other anti-discrimination statutes when a key term is undefined, importing Title VII's duty to accommodate religious practices into the FHA would exceed this court's authority to " 'fill[ ] a gap left by Congress' silence' [and would effectively] 'rewrit[e] rules that Congress has affirmatively and specifically enacted.' " *See Matter of Oswego Barge Corp.*, 664 F.2d 327, 339 (2d Cir.1981) (*quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). The lower court was correct, therefore, in its conclusion that the FHA does not require Yale to make reasonable accommodations for the students' religious obligations. *Hack*, 16 F.Supp.2d at 193.

It is not clear, however, that plaintiffs are in fact seeking an "accommodation." Even if we assume that Yale's parietal rule is reasonably necessary and is not an artificial, arbitrary, or unnecessary practice, there is apparently a viable alternative housing policy: Yale can provide exemptions for plaintiffs and others similarly situated. Certainly, Yale is not obligated to restructure its housing program anymore than an owner of a rooming house would be obligated to change his method of operation because plaintiffs sought to live there, and plaintiffs do not seek that relief. True, the current policy of permitting plaintiffs to live elsewhere is an alternative with less discriminatory effect. It does not, however, eliminate the

disproportionate financial burden on Orthodox Jews who must pay for two apartments. Thus, exemption may be an even better alternative, although not necessarily the only one. I do not mean to suggest that plaintiffs, choosing to go to Yale, can transfer an economic burden occasioned by their religious beliefs from themselves to Yale. There is, however, no reason to believe that Yale would have to carry vacant student housing space if a few freshmen and sophomores were exempted. Each year the college is faced with far more significant variables: how many approved applicants will enroll, how many will return, what will be the mix of married and unmarried or younger and older students. At least at this juncture we are given no reason to believe that a few exemptions will have any significant economic impact upon Yale.

CONCLUSION

"Dismissal of a complaint before discovery is a drastic step. It is a device that must not be employed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'" *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 22 (2d Cir.1982) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)) (other citations omitted); *see also Geisler v. Petrocelli*, 616 F.2d 636 (2nd Cir.1980). "This caution against dismissal applies with even greater force where the complaint is pro se, or where the plaintiff complains of a civil rights violation." *Easton v. Sundram*, 947 F.2d 1011, 1015 (2d Cir.1991) (citations omitted). Given our conclusion that plaintiffs have standing to pursue their antidiscrimination claims under the FHA and given the allegations in the complaint as to the effective unavailability of student housing at Yale for a defined class of Orthodox Jews, I must respectfully dissent from my colleagues' affirmance. I would remand to the district court for

discovery and further proceedings on the merits. It should be left to the finder of fact to determine whether the policy had a discriminatory effect on Orthodox Jews, whether the mandatory on-campus policy is reasonably necessary to achieve an important business objective of Yale College, and, if so, whether Yale unreasonably refused to adopt an alternative, feasible policy that would have provided a comparably effective means of meeting Yale's educational and financial objectives without imposing significant additional burdens.

APPENDIX B

United States District Court,

D. Connecticut.

Elisha D. HACK, et al., Plaintiffs,

v.

THE PRESIDENT AND FELLOWS OF YALE COLLEGE d/b/a Yale Corporation and Yale University, et al., Defendants.

No. CIV. 3:97CV02212 (AVC).

July 31, 1998.

William F. Gallagher, Barbara L. Cox, Gallagher, Gallagher & Calistro, New Haven, CT, Nathan Lewin, Richard W. Garnett, Miller, Cassidy, Larroca & Lewin, Washington, DC, for Elisha D. Hack, Jeremy A. Hershman, Batsheva Greer, Lisa B. Friedman, plaintiffs.

James Sicilian, Felix J. Springer, William D. Thompson, Jr., Day, Berry & Howard, Hartford, CT, for Yale College, President & Fellows dba Yale Corp, Yale University, Richard H. Brodhead, Betty Trachtenberg, defendants.

RULING ON THE DEFENDANTS' MOTION TO DISMISS

COVELLO, Chief Judge.

This is an action for damages and injunctive relief in which the plaintiffs, who are freshmen and sophomores at Yale College, claim that the defendants have discriminatorily

denied them permission to reside off campus. Specifically, the plaintiffs claim that: 1) the defendants violated the First, Fourth, and Fourteenth Amendments to the United States Constitution by interfering with their free exercise of religion; the plaintiffs claim relief under 42 U.S.C. § 1983; 2) the defendants violated the federal Fair Housing Act, 42 U.S.C. § 3604; 3) the defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2; and 4) the defendants are liable under common law tenets concerning breach of contract and unjust enrichment.

The defendants have now filed the within motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the complaint has failed to state a claim upon which relief can be granted. The issues presented are: 1) whether the implementation of Yale's housing policy constitutes action under color of state law; 2) whether Yale's housing policy decision to deny the plaintiffs' request to live off campus constitutes a violation the federal Fair Housing Act; 3) whether Yale's housing policy constitutes an illegal tying arrangement under the Sherman Antitrust Act; 4) whether Yale's housing policy constitutes a monopoly power in a relevant market under the Sherman Antitrust Act; 5) whether the implementation of Yale's housing policy constitutes a breach of contract due to Yale's alleged failure to accommodate the plaintiffs' bona fide religious convictions; and 6) whether the implementation of Yale's housing policy constitutes unjust enrichment.

For the reasons hereinafter set forth, the court concludes that: 1) the administrators of Yale College did not act under color of state law when they denied the plaintiffs' request to reside off campus; 2) the plaintiffs lack standing to claim a violation of the federal Fair Housing Act; 3) the amended complaint has not sufficiently alleged that Yale has the requisite market power in the tying market to state a claim of an illegal tying arrangement; 4) the amended

complaint has not sufficiently alleged a relevant market necessary to state a claim of an illegal monopoly; and 5) the court declines to exercise pendent jurisdiction over the state law claims of breach of contract and unjust enrichment. Accordingly, the defendants' motion to dismiss (document no. 11) is hereby GRANTED.

FACTS

The amended complaint alleges the following. The plaintiffs, Elisha D. Hack, Jeremy A. Hershman, Batsheva Greer, and Lisa B. Friedman, are freshman and sophomore students at Yale College. The plaintiffs assert that the defendants, The President and Fellows of Yale College d/b/a Yale Corporation and Yale University, Richard H. Brodhead, and Betty Trachtenberg (hereinafter "Yale"), discriminated against them because of their religion when the defendants denied the plaintiffs' request to reside off campus.

The residence halls at Yale College are co-educational and the college does not operate single-sex residence halls. Yale's "Dormitory Regulations" provide that "[a]ll freshmen and sophomores are required to live on campus, except freshmen who are married or who are over twenty-one years of age." A freshman or sophomore who is married or twenty-one years or older may request an exemption from the on campus requirement. Students who are accepted to and enroll in the undergraduate degree program at Yale College must comply with the housing policy.

At the time the plaintiffs filed the amended complaint, each of them was younger than twenty-one years of age and not married. The plaintiffs are Orthodox Jews "whose religious beliefs and obligations regarding sexual modesty forbid them to reside in the co-educational housing provided and mandated by Yale."

In April 1995, admissions officials admitted Friedman to Yale College. She deferred enrollment until the Fall of 1996. In April 1996, she wrote a letter to Yale requesting an exemption from the housing requirement based on her religious beliefs and obligations. Yale denied her request.[1] In April 1995, admissions officials admitted Hershman to Yale College. He deferred enrollment until the Fall of 1996. On March 18, 1996 he requested an exemption from Yale's dormitory regulations based on his religious beliefs and obligations. In April 1995, admissions officials admitted Hack to Yale College. He deferred enrollment for two years until the Fall of 1997. On May 9, 1997, Hack requested an exemption from the housing requirement based on his religious beliefs and obligations. Finally, in April 1996, admissions officials admitted Greer to Yale College, but she deferred enrollment until the Fall of 1997. She requested an exemption from Yale's housing policy based on her religious beliefs and obligations. Yale denied all of the plaintiffs' exemption requests and required them to live on campus in the co-educational residence halls.

Yale charged the plaintiffs for the residence hall fee, which the plaintiffs paid. The residence hall rooms remain vacant for the plaintiffs' return. All of the plaintiffs have elected, however, to reside off campus in housing "that provides ... an appropriate environment in which to practice [their] faith."

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[1] The amended complaint alleges that Yale's denial letter explained the following:

" 'Yale will continue the practice of working with the students to accommodate their religious practices.' [Dean Trachtenberg] did not deem Ms. Friedman's own sincere religious practices to be a sufficient reason to depart from Yale's housing regulations."

STANDARD

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) involves a determination as to whether the plaintiff has stated a claim upon which relief may be granted. *Fischman v. Blue Cross Blue Shield,* 755 F.Supp. 528 (D.Conn.1990). The motion must be decided solely on the facts alleged. *Goldman v. Belden,* 754 F.2d 1059, 1065 (2d Cir.1985). A court must assume all factual allegations in the complaint to be true and must draw reasonable inferences in favor of the non-moving party. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Such a motion should be granted only when no set of facts consistent with the allegations could be proven which would entitle the plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The issue is not whether the plaintiff will prevail, but whether he should have the opportunity to prove his claims. *Id.*

DISCUSSION

I. *§ 1983 Claims*

Yale argues that the "first four counts [in the amended complaint] ... all fail to state a claim because Yale is not an entity acting 'under color of state law' for purposes of [42 U.S.C.] § 1983." Specifically, Yale argues that it is not a state actor and that its conduct cannot be deemed state action.

The plaintiffs first respond that a determination of whether Yale is a state actor or whether Yale's conduct can be fairly attributed to the State of Connecticut "will require careful analysis of the particular facts in this case." Moreover, the plaintiffs contend that "these claims should not be dismissed before the plaintiffs have had an opportunity to engage in the discovery to which they are entitled and to introduce supporting evidence."

Second, "the plaintiffs initial 'state action' theory is that Yale will, after discovery and a presentation of the evidence, be shown to be a 'Government entity' under *Lebron.*"

Third, the plaintiffs respond that the state action inquiry is fact based and that "[t]here is no 'unitary test' [to] determin[e]" whether conduct should be attributed to the state. The plaintiffs argue that "the facts of each case [should] determine the test."

Section 1983 provides that no person acting "under color of any statute ... of any State" shall deprive another of any right, privilege or immunity "secured by the Constitution and the laws" of the United States. 42 U.S.C. § 1983. A plaintiff may bring a claim "under § 1983 only if the defendant acted 'under color' of state law." *Rendell-Baker v. Kohn,* 457 U.S. 830, 835, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). An entity can be deemed to have acted 'under color' of state law either under the state actor analysis or the state action analysis.

A. *State Actor*

Yale first argues that it is not a state actor for § 1983 purposes. Yale, relying on *Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), posits that the amended complaint has failed to satisfy the third prong of a three-pronged analytical test, which determines whether an entity is a state actor. Specifically, Yale contends that "the plaintiffs have not alleged ... that the State of Connecticut has retained permanent authority to appoint a majority of the members of the Yale Corporation or any governing body at Yale University."

The plaintiffs respond that "Yale asks this Court to extract from *Lebron's* fact-intensive inquiry a 'three-pronged' formula that would limit *Lebron's* reasoning to the particular

facts of that case." The plaintiffs assert that "[t]he Court in *Lebron* did *not* hold that state-action analysis hinges on the number of directors who are public officials or who are appointed by public officials." The plaintiffs further respond that "the [first] two factors relied on in *Lebron* are indisputably present in this case...."

In *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), the plaintiff sued Amtrak because its vice president, in accordance with an Amtrak policy, refused to grant the plaintiff's request to post a political advertisement on a large billboard located in Penn Station. *Id.* at 376, 115 S.Ct. 961. Lebron claimed that the vice president's refusal violated his First and Fifth Amendment rights. *Id.* at 377, 115 S.Ct. 961. The District Court for the Southern District of New York concluded that Amtrak was a government actor because it maintained "close ties to the Federal Government." *Id.* The Court of Appeals for the Second Circuit reversed and concluded that a congressional act created Amtrak wherein Congress specifically stated that Amtrak was not a government entity. *Id.* at 378, 115 S.Ct. 961.

The Supreme Court's inquiry in *Lebron* focused on whether Amtrak was a "[g]overnment-created and controlled corporatio[n]." *Id.* at 394, 395-400, 115 S.Ct. 961. In determining whether Amtrak was a government actor, the Supreme Court developed a three-pronged analytical test:

> where...[1] the Government creates a corporation by special law, [2] for the furtherance of government objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 400, 115 S.Ct. 961.

In order for an entity to be deemed a state actor each of the three prongs must be satisfied. *See, e.g., Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico* (AEELA), 84 F.3d 487, 491-92 (1st Cir.1996) (holding that because the government of Puerto Rico did not appoint any directors to AEELA'S board, the plaintiffs failed to satisfy the third prong of the *Lebron* test; therefore AEELA was not a government actor); *See also Hall v. American Nat'l Red Cross,* 86 F.3d 919, 921-22 (9th Cir.1996), *cert. denied,* 519 U.S. 1010, 117 S.Ct. 516, 136 L.Ed.2d 404 (1996)(holding that because the President of the United States appointed only eight out of the fifty members who sat on the Red Cross' Board of Governors, the plaintiff failed to satisfy the third prong of the *Lebron* test; therefore the Red Cross was not a government actor).

Based on the foregoing, the court concludes that a complaint must allege facts to support all three prongs of the *Lebron* test to establish that a party is a state actor within the meaning of § 1983.

In their motion to dismiss, Yale only argues that the amended complaint fails to sufficiently allege facts with respect the third prong in *Lebron,* therefore, the court limits its discussion to that issue alone.

The third prong of the *Lebron* test requires that the government retain for itself the permanent authority to appoint a majority of the directors of a corporation in order for the corporation to be deemed a state actor.[2]

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[2] *See, e.g., Abu-Jamal v. National Pub. Radio,* No. 96-0594, 1997 WL 527349, *4, 1997 U.S. Dist. LEXIS 13604, at *10 (D.D.C. Aug. 21, 1997) ("[I]n addition to government creation to further governmental purposes, there must be government *control*... [which] is achieved when the government commandeers the board of directors." (emphasis added)).

Yale argues specifically that "the plaintiffs have not alleged ... that the State of Connecticut has retained permanent authority to appoint a majority of the members of the Yale Corporation or any governing body at Yale University."

The plaintiffs respond "[t]he Court in *Lebron* did *not* hold that state-action analysis hinges on the number of directors who are public officials or who are appointed by public officials."

The amended complaint alleges that "by designating the Governor and Lieutenant Governor as *ex officio* Fellows [of Yale College], the State of Connecticut treats Yale as a state actor."

Yale's governing body is comprised of nineteen members. The Governor and Lieutenant Governor, as *ex officio* members, constitute only two of the nineteen members. The State of Connecticut, therefore, does not retain the authority to appoint a *majority* of directors of Yale Corporation.[3] *See, e.g., Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico* (AEELA), 84 F.3d 487 (1st Cir.1996); *Hall v. American Nat'l Red Cross,* 86 F.3d 919, 921-22 (9th Cir.1996), *cert. denied,* 519 U.S. 1010, 117 S.Ct. 516, 136 L.Ed.2d 404 (1996); *Abu-Jamal v. National Pub. Radio,* No. 96-0594, 1997 WL 527349, *4, 1997 U.S. Dist. LEXIS 13604, at *10 (D.D.C. Aug. 21, 1997) (rejecting the allegation that NPR

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[3] *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 385, 115 S.Ct. 961, 130 L.Ed.2d 902 (the President appoints six of nine members to sit on Amtrak's board of directors as follows: 1) the Secretary of Transportation, or his designee sits *ex officio;* 2) three directors are appointed with the advice and consent of the Senate; 3) two are chosen without Senate involvement. (Of the remaining three, two are chosen by the Secretary of Transportation, and the third is elected by the other eight directors and is Amtrak's president.)).

was a state actor because the government did not appoint any directors to its governing board).

The plaintiffs rely on *Krynicky v. University of Pittsburgh,* 742 F.2d 94 (3d Cir.1984), in which the Third Circuit concluded that the University of Pittsburgh was a state actor. The plaintiffs, in opposing the within motion, argue that the university was a state actor because "*inter alia,* several government officials were *ex officio* trustees and the state appointed *one-third* of the trustees." The Third Circuit did not arrive, however, at its conclusion based solely on allegations of *ex officio* and state-appointed trustee membership. Instead, the court concluded that a legislative act "establish[ed the] University of Pittsburgh as an *instrumentality* of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education." *Id.* at 102 (emphasis in original).[4]

By failing to allege that the State of Connecticut retains permanent authority to appoint a majority of the members to Yale's governing board, the amended complaint fails to satisfy the third prong of the *Lebron* test. The court concludes that because the amended complaint does not satisfy each prong of the *Lebron* test, Yale cannot be considered a state actor.

B. *State Action*

The defendants argue that "the plaintiffs apparently refrain from making an alternative claim for state action under the pre-*Lebron* analysis." Nevertheless, the defendants argue that even if the plaintiffs were to argue that Yale's

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[4] The plaintiffs also rely on *Isaacs v. Board of Trustees of Temple Univ.-of the Commonwealth Sys. of Higher Educ.,* 385 F.Supp. 473 (E.D.Pa.1974). In *Isaacs,* the court concluded that Temple University was a state actor. Specifically, a legislative act had "profoundly altered the relationship between Temple and the Commonwealth ... [whereby] the act designated Temple as an instrumentality of the commonwealth [and] incorporated it as a state-related institution." *Id.* at 478.

conduct is state action, "the United States Supreme Court has already rejected such an argument [in *Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982)]."

First, Yale argues that the amended complaint has failed to allege that the state, through regulation or policy, "compelled or significantly encouraged Yale's decision to enact" its housing policy. Moreover, Yale contends that "constitutional confirmation of Yale's charter does nothing to establish that the state controls Yale." Yale further argues that the "state has continually diminished its role with regard to Yale's governing board" such that today only the Governor and Lieutenant Governor are board members by virtue of their respective offices.

Second, Yale argues that the allegations in the amended complaint concerning appropriations of public funds to Yale by the state of Connecticut are mostly historical. Specifically, Yale contends that the amended complaint has not alleged that Yale has received public funds from the state of Connecticut from 1882 to the present day.

The plaintiffs respond that "a variety of facts establish[ ] that Yale's housing policy is state action for purposes of § 1983 because of the unique nature of the relationship between Yale and the government. All of these facts tend to show that Yale is a state actor and its housing policy is state action for § 1983 purposes."

State action may be present when the state and a private entity are so closely connected that the action of the private entity "may be fairly treated as the state itself." *Blum, Comm'r of the New York State Dep't of Soc. Servs. v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). The underlying purpose of attributing state action to private activity is "to assure that constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff

complains." *Id.* (emphasis in original).

The Supreme Court has developed four principles to analyze claims of state action. Specifically, the principles are (1) whether there exists a "symbiotic relationship" between the entity and the state; (2) whether there is "extensive regulation" of the entity by the state; (3) whether the entity "depended on the State for funds"; and (4) whether the entity "performs a public function." *Rendell-Baker,* 457 U.S. 830, 840-42, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

1. *Yale's Relationship with and Regulation by the State*

In order for private conduct to be fairly treated as the state itself, the state must have "exercised coercive power or ha[ve] provided such significant encouragement, either overt or covert, that the choice [of the private actor] must in law be deemed to be that of the state." *Blum,* 457 U.S. at 1004, 102 S.Ct. 2777.

In *Rendell-Baker,* the Supreme Court held that personnel decisions made by the director of a private school could not be fairly attributed to the state. *See Rendell-Baker,* 457 U.S. at 841-43, 102 S.Ct. 2764. The school was a private institution for maladjusted high school students, which was regulated by Massachusetts' statutes.[5] The Court explained that "[t]he most intrusive ... regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors at the school." *Id.* at 841-42, 102 S.Ct. 2764.

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[5] *See Rendell-Baker,* 457 U.S. at 832 n. 1, 102 S.Ct. 2764 ("Chapter 766, 1972 Mass. Acts, Mass. Gen. Laws Ann., ch. 71B § 3 (West Supp.1981)." The statutes provide regulations, in relevant part, for school-related matters including: record-keeping, student-teacher ratios, written personnel standards and procedures, etc. *See Rendell-Baker,* 457 U.S. at 833, 102 S.Ct. 2764.

Despite the state's financial assistance to and regulation of the school, the Court held that the state of Massachusetts did not compel or influence the decisions to discharge the faculty members. Moreover, Justice White explained that a critical factor in finding no state action "[wa]s the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State." *Rendell-Baker,* 457 U.S. at 844, 102 S.Ct. 2764 (White, J., concurring).

In the present case, the amended complaint does not allege that the State of Connecticut, either through a regulation or policy, exercised coercive power or significantly encouraged Yale to adopt its housing policy or to render specific housing decisions. At most, the amended complaint alleges that two state officials sit, merely by virtue of their office, on Yale's governing board and that Yale has a "300-year history of partnership with the Colony and State of Connecticut...."

Similar to the complaint in *Blum,* 457 U.S. 991, 102 S.Ct. 2777, the amended complaint "seeks to hold state officials liable for the actions of private parties...." *Id.* at 1003, 102 S.Ct. 2777 (holding that although the state regulated and subsidized the nursing homes, private parties, not state officials, made the administrative decisions; therefore the decisions could not be treated as state action.). These allegations alone, however, do not suffice to make Yale's conduct attributable to the state.

2. *Public Funds Appropriated to Yale*

In *Rendell-Baker,* 457 U.S. 830, 102 S.Ct. 2764, the state appropriated funds to the school, which at times accounted for 90-99% of the school's budget. *Id.* at 832, 102 S.Ct. 2764. The court concluded that "the school's receipt of public funds do not make the discharge decisions acts of the State." *Id.* at 840, 102 S.Ct. 2764; *see also Blum,* 457 U.S. at 1011, 102 S.Ct. 2777 (although the state subsidized

operating costs for the nursing homes and paid medical expenses for more than 90% of the homes' patients, the state funding did not transform the private conduct into state action).[6]

The amended complaint alleges that Yale receives "continued financial and other support provided by the governments of New Haven, Connecticut, and the United States." Notwithstanding the fact that the amended complaint fails to allege the amount of financial support Yale has received, in *Rendell-Baker,* 457 U.S. 830, 102 S.Ct. 2764, the Supreme Court held that although a school received between 90% and 99% of its operating costs from the government, the school director's conduct was not state action. *Id.* at 832, 102 S.Ct. 2764. Consequently, the allegation that Yale received some financial support from the state is insufficient to establish that Yale's conduct is state action.

3. *Yale's Conduct under Public Function Analysis.*

For a private entity's conduct to rise to the level of state action under the public function analysis, the Supreme Court has held that "the question is whether the function performed has been traditionally the *exclusive* prerogative of the state." *Id.* at 842, 102 S.Ct. 2764 (internal quotations and citations omitted). Furthermore, the Court explained that its "holdings have made clear that the relevant question is not simply whether a private group is serving a public function." *Rendell-Baker,* 457 U.S. at 842, 102 S.Ct. 2764. Specifically, the Court explained, "that [although] a private entity [may] perform[ ] a public function which serves the

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[6] *See also Cohen v. President and Fellows of Harvard College,* 568 F.Supp. 658, 660 (D.Mass.1983) ("[T]he receipt of government funds does not render the government responsible for a private entity's decisions concerning the use of those funds.") (quoting *Gerena v. Puerto Rico Legal Servs.,* 697 F.2d 447, 450 (1st Cir.1983)).

public [that] does not make its acts state action." *Id.*

On at least three occasions, the Supreme Court has analyzed state action under the public function analysis. In *Rendell-Baker*, the Court held that although the private high school for maladjusted students served the public, it did not perform functions that were traditionally the exclusive prerogative of the state. *Id.*

Similarly in *Blum*, 457 U.S. 991, 102 S.Ct. 2777, the Court held that nursing homes' provision of medical care for Medicaid patients was not a public function that was traditionally within the exclusive province of the state. *Id.* at 1011, 102 S.Ct. 2777. The Court explained that "it would not follow that the decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public." *Id.* at 1012, 102 S.Ct. 2777.

Finally, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987), the Court held that conduct by the United States Olympic Committee did not rise to the level of state action under the public function analysis. Specifically, the Court explained that "the activities performed by the USOC [United States Olympic Committee] serve[d] a national interest.... [However,] [n]either the conduct nor the coordination of amateur sports has been a traditional governmental function." *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 544-45, 107 S.Ct. 2971.

The amended complaint alleges that the State of Connecticut has "held Yale out to the public as performing public functions for the benefit of the state." The court does not disagree that Yale serves the public and that this service may benefit the State of Connecticut. This, however, is not sufficient to establish that Yale's conduct is state action under the public function analysis. Following *Rendell-Baker* and *Blum*, the court concludes that Yale's housing policy

decisions cannot be fairly attributed to the State of Connecticut merely because Yale "provid[es] quality education at the college and graduate level" that may benefit the state.

Therefore, having found that: 1) Yale is not a state actor; and 2) Yale's housing policy decisions may not be treated as state action, the court concludes that Yale did not act under color of state within the meaning of 42 U.S.C. § 1983. Consequently, counts one, two, three, four, and ten, as set forth in the amended complaint are hereby dismissed.

II. *Federal Fair Housing Act Claims*

Yale next argues that the amended complaint has not established a cause of action under the federal Fair Housing Act, 42 U.S.C. § 3604. Specifically, Yale argues that it has provided rooms for the plaintiffs in the residence halls, and the rooms remain vacant for the plaintiffs' return.

In addition, Yale argues that the federal Fair Housing Act does not create a duty in the defendants to reasonably accommodate the plaintiffs' religious beliefs. Specifically, Yale contends that "Section 3604(f), concerning handicapped individuals, is the only part of the FHA that requires 'reasonable accommodations' or 'reasonable modifications of existing premises'." Yale contends that this section does not apply to the plaintiffs because the amended complaint does not allege that the plaintiffs are handicapped.

The plaintiffs respond "that Yale has discriminated against them 'because of religion' by requiring students to live in co-educational housing, by treating their religious-based exemptions from co-educational housing differently from other requests, and by exempting students from the on-campus housing requirement for non-religious reasons while refusing to exempt those who have invoked religious reasons." The plaintiffs further respond that "providing co-

educational housing to all students does not defeat the plaintiffs'... claim ... because [co-educational] housing, in and of itself, violates the students' religious convictions." The plaintiffs contend that "this is true *even if* Yale were not required, as an initial matter, to 'accommodate' the plaintiffs in the same way it would be required to accommodate a physical handicap."

The federal Fair Housing Act provides, in part, that "it shall be unlawful to refuse to sell or rent ... or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

The federal Fair Housing Act confers statutory standing to challenge discriminatory practices on any "aggrieved person." 42 U .S.C. § 3613(a)(1)(A).[7] To establish that a plaintiff is an aggrieved person under the Act, "a private plaintiff [must] allege injury in fact within the meaning of Article III of the [United States] Constitution, that is, that he allege distinct and palpable injuries that are fairly traceable to [the] defendants' actions." *LeBlanc-Sternberg v. Fletcher,* 67 F.3d 412 (2d Cir.1995).

The plaintiff "invoking federal jurisdiction bears the burden of establishing the[ ] elements [of standing]." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Supreme Court has

> established that the irreducible constitutional minimum of standing contains three elements. First,

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[7] "An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach." 42 U.S.C. § 3613(a)(1)(A).

> the plaintiff must have suffered an injury in fact.... Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130 (citations and internal quotations omitted).

The amended complaint has set forth no factual allegations that satisfy the injury-in-fact element. Section 3604(a) makes it unlawful to *refuse or deny* housing to persons based on their race, color, religion, sex, familial status, or national origin. Yale has neither refused to provide residence hall accommodations to the plaintiffs nor denied the plaintiffs rooms in the residence halls. Rooms in the residence halls remain vacant at Yale College for the plaintiffs' return. The amended complaint fails to satisfy the injury-in-fact element. Accordingly, the plaintiffs lack standing to claim a violation of § 3604(a).

The federal Fair Housing Act also provides, in part, that "it shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling ... because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b).

The amended complaint has not satisfied the requisite injury-in-fact element to claim a violation of § 3604(b). The plaintiffs were not denied housing or discriminated against by the terms or conditions of Yale's housing policy. In implementing the housing policy, Yale allowed exemptions for students who satisfied one of two criteria. The plaintiffs satisfied neither. The plaintiffs' requests to live off campus were denied, not because Yale discriminated against them, but because they did not satisfy the exemption criteria. The plaintiffs, therefore, lack standing to claim a violation of § 3604(b).

Finally, Yale argues that the federal Fair Housing Act does not create a duty in the defendants to reasonably accommodate the plaintiffs' religious beliefs.

The amended complaint alleges that "by refusing to accommodate the plaintiffs religious obligations, the defendants have discriminated against the plaintiffs because of their religion."

The reasonable accommodations provision in the federal Fair Housing Act, 42 U.S.C. § 3604(f)(3), pertains only to discrimination against handicapped individuals. Specifically, this subsection provides that refusal to make reasonable accommodations for a handicapped individual constitutes discrimination. 42 U.S.C. § 3604(f)(3)(B). The statute cannot be construed to mean that refusal to make reasonable accommodations constitutes discrimination in any other context. The amended complaint has not alleged that the plaintiffs are handicapped. Consequently, the defendants are not required to make reasonable accommodation.

Having found that the plaintiffs are not aggrieved persons within the meaning of the federal Fair Housing Act, and that the Act does not require the defendants to make reasonable accommodations, the court concludes that the plaintiffs lack standing to claim relief under 42 U.S.C. §§ 3604(a), 3604(b) and 3604(f). Count five as set forth in the amended complaint is hereby dismissed.

III. *Sherman Antitrust Claims*

A. *Illegal Tying Arrangement*

The defendants argue that the amended complaint fails to sufficiently allege that Yale has the requisite economic market power to make the tying arrangement

illegal under 15 U.S.C. § 1.[8] The defendants argue that Yale is not unique, therefore, it does not possess sufficient market power in the tying market. Specifically, the defendants contend that "[i]n a futile effort to satisfy the ... element[ ][of] market power[,] the plaintiffs assert that 'a Yale degree has unique attributes that make it without substitute or equal'." The defendants argue that "to establish ... market power based on the uniqueness of a product, the plaintiff must allege ... some special advantage inherent in the product that makes the product unique."

The plaintiffs respond that "a Yale education is sufficiently unique to confer economic power." The plaintiffs contend that this is supported by the allegations "that a Yale degree is of incomparable value to potential employers and to graduate schools and that only a Yale degree provides unique lifetime advantages, including access to the worldwide network of Yale alumni." The plaintiffs assert that "these allegations of uniqueness meet the burden of pleading the market power element of a tying claim."

Section One of the Sherman Antitrust Act provides, in part, that "every contract ... in restraint of trade or commerce among the several States ... is hereby declared illegal." 15 U.S.C. § 1. Under Section One, a tying arrangement is " 'an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product.' " *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514,

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[8] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1.

1516-17 (2d Cir.1989)(quoting *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)). To sufficiently state a claim of an illegal tie, a plaintiff must allege

> five specific elements: first, a tying and a tied product; second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, involvement of a 'not insubstantial' amount of interstate commerce in the tied market.

Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir.1980)(internal citations omitted).

The Supreme Court "ha[s] condemned tying arrangements when the seller has some special ability--usually called 'market power'--to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 13-14, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). The market must be defined so as "to include all reasonable substitutes for the product." *Id.* at 37-38, n. 7, 104 S.Ct. 1551 (O'Connor, J., concurring). One way a seller can achieve market power or "appreciable economic power" is by producing a unique product, which has little or no competition from functionally similar products or services. *See Lee v. Life Ins. Co. of N. Am.,* 23 F.3d 14, 16 (1st Cir.1994), *cert. denied,* 513 U.S. 964, 115 S.Ct. 427, 130 L.Ed.2d 340 (1994). Consumer preference for a "brand name alone does not establish product 'uniqueness' necessary for [appreciable economic power]." *Id.* at 17.

In *Lee,* the First Circuit held that the University of Rhode Island's ("URI") policy to condition semester registration upon the payment of a fee for use of the on-campus health clinic was not an illegal tying arrangement. *Id.* at 15. The university required full-time undergraduate students to pay the health clinic fee. *Id.* In order to use the clinic, students were also required to carry supplemental insurance. The university offered supplemental insurance through "a private health care underwriter, which URI sponsor[ed] as its 'default' insurer." *Id.* The plaintiffs alleged that "conditioning continued matriculation at URI on payment of the ... clinic fee and/or the ... supplemental insurance premium" was an illegal tying arrangement. *Id.*

The court explained that "URI obviously is a 'unique' institution in a colloquial sense, [however, the] appellants cannot claim that other institutions of higher education do not or cannot provide 'functionally similar' educational offerings to potential URI applicants." *Lee,* 23 F.3d at 17. Therefore, the court held that the plaintiffs had failed to state a claim that URI possessed appreciable economic power "in the tying market for a university education." *Id.*

In opposing the within motion, the plaintiffs argue that "because [they] have alleged that a Yale education is unique, they have sufficiently stated their tying claim." With respect to the uniqueness of a product, the Supreme Court has explained, however, that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product. Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant in prior tying-clause cases." *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 620-21, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977)(Fortner II).

The amended complaint alleges that "by conditioning the provision of a Yale education on the purchase of unrelated housing services, the defendants are engaged in an illegal restraint of trade", which is in violation of Section One of the Sherman Antitrust Act. The amended complaint further alleges that Yale is unique and that this uniqueness confers sufficient economic power in the educational market. Specifically, Yale's uniqueness is embodied in its "value to potential employers and graduate schools ... and certain important advantages, such as the worldwide network of Yale Alumni".

The amended complaint has not specifically alleged whether the tying market in this case is a general university education or an Ivy League education. Moreover, the amended complaint does not allege that there are no universities functionally equivalent to Yale College in either of these educational markets. Consequently, the amended complaint fails to allege that Yale is unique beyond the colloquial meaning of the word as the First Circuit explained in *Lee*.

Furthermore, the amended complaint fails to allege that a Yale degree has some advantage that no other universities in the educational market possess. Even if, as plaintiffs contend, "Yale [is] one of the world's most elite academic institutions", preference for brand name alone does not establish the requisite uniqueness necessary to confer appreciable market power. *See Lee v.. Life Ins. Co. of N. Am.*, 23 F.3d 14, 17 (1st Cir.1994). As a result, the court concludes that Yale does not possess the character of uniqueness needed to confer market power.

The amended complaint, therefore, fails to sufficiently allege that Yale has the requisite economic market power in the tying product market--in either the broader university education market or the narrower Ivy League education market--to coerce the plaintiffs to accept

the tied-product--residence hall accommodations.

B. *Monopoly Claim.*

The defendants argue that the amended complaint has failed to define a relevant geographic and product market under 15 U.S.C. § 2.[9] Specifically, the defendants contend "to the extent that plaintiffs are claiming that the relevant market consists only of student housing owned by Yale, they have failed to take into account other available housing." The defendants further argue that the amended complaint's relevant market definition fails "to take plainly interchangeable products into account [and] also flies in the face of the settled principle that power over one's own products does not create a cognizable antitrust issue."

The plaintiffs respond that "Yale's on-campus residence rules for its college freshmen and sophomores exert market power that monopolists would envy. The relevant market is Yale student housing, and Yale exercises monopoly power over it." The plaintiffs further respond that "Yale's on-campus housing is not interchangeable with housing not owned by Yale in the New Haven area by virtue of Yale's housing policy. [Thus,] [f]or *pleading* purposes, the plaintiffs have defined the relevant market by proper 'reference to the rule of reasonable interchangeability' and cross-elasticity of demand." (emphasis in original).

Section Two of the Sherman Antitrust Act provides, in relevant part, that "[e]very person who shall monopolize ... any part of the trade or commerce among the several States

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[9] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

... shall be deemed guilty of a felony." 15 U.S.C. § 2 (1997). The Supreme Court has explained that a

> monopoly under § 2 of the Sherman Antitrust Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

The pleading requirements for a monopoly claim place "the burden of defining the relevant market" on the plaintiffs. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir.1997), *cert. denied*, 523 U.S. 1059, 118 S.Ct. 1385, 140 L.Ed.2d 645 (1998). A complaint may be dismissed if it fails to define a relevant market by reference to the rule of reasonable interchangeability or cross-elasticity of demand. *Id.* In other words, a complaint may be dismissed if the definition of relevant market excludes any reasonably interchangeable substitute products. *Id.*

To determine whether the complaint's proposed relevant market definition is legally sufficient, a court must analyze "not [the] commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes." *Queen City Pizza, Inc.*, 124 F.3d at 438 (internal quotation and citation omitted). Moreover, "[w]here the relevant market proposed by the plaintiff is not even *alleged* to encompass all interchangeable substitute products, the market is legally (rather than factually) insufficient, and a motion to dismiss is appropriate." *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 347, n. 23 (N.D.Ill.1997).

In *Rohlfing,* the plaintiffs claimed that a nursing home facility, Manor Care, violated Section Two of the Sherman Antitrust Act by requiring the residents to purchase medications from a designated pharmacy, Vitalink. *Id.* at 333-34. Manor Care owned 82.3% interest in Vitalink. *Id.* Manor Care's pharmaceutical policy permitted residents to purchase medications from a different pharmacy provided that the alternative pharmacy "compl[ied] with the strict packaging rules enforced at Manor Care facilities." *Id.* at 334. Most residents selected Vitalink to supply pharmaceutical services because other pharmacies were either not able to or not willing to comply with the packaging requirements. *Id.*

In *Rohlfing,* the plaintiff alleged that the relevant market Manor Care monopolized was "the sale of pharmaceutical products to residents of Manor Care nursing home facilities." *Id.* at 345. The court explained that the plaintiff had only alleged there were no reasonable substitutes for the pharmaceutical services available on the supply side. However, the plaintiff failed to properly address the demand side. *Rohlfing,* 172 F.R.D. at 345-346. Specifically, the court explained that if the residents were not satisfied with the pharmaceutical services or prices they could have selected a different nursing home that did not use Vitalink. *Id.* at 346.

The failure to address the demand side was fatal to the plaintiff's complaint. The court held that "the relevant market ... cannot be limited to Manor Care facilities alone: it must be broad enough to encompass all nursing facilities whose services are 'reasonably interchangeable' with those provided by Manor Care." *Id.*

Rohlfing is instructive. The amended complaint, here, similarly has failed to allege all reasonably interchangeable substitutes in the relevant market. The amended complaint alleges that the "relevant market

monopolized by Yale is the housing market for Yale students in New Haven." In the alternative, the amended complaint alleges that "the relevant market is the market for non-subsidized rental housing in the City of New Haven."

A legally sufficient definition of a relevant market is not defined by reference to a particular plaintiff, but by reference to services or commodities that are reasonably interchangeable. Specifically, a relevant market must be defined by reference to the commodities or services purchased by general consumers for purposes similar to those of the plaintiff. *See, e.g., Queen City Pizza, Inc.,* 124 F.3d 430.

In this case, the amended complaint's allegation that the relevant market is housing for Yale students fails to include all interchangeable substitutes. The plaintiffs could have opted to attend a different college or university if they were not satisfied with Yale's housing policy. *See, e.g., Rohlfing,* 172 F.R.D. at 346. Although the plaintiffs argue that Yale is unique and does not have a reasonable substitute, the court has already dismissed this argument with respect to the plaintiffs' tying claim. Similarly, the court is not persuaded by the same argument in their monopoly claim.

In support of their monopoly claim, the plaintiffs rely on *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College,* 128 F.3d 59 (2d Cir.1997). In *Hamilton,* Hamilton College promulgated a housing policy by which all students were required to live on campus. The plaintiffs alleged that the university housing policy created a monopoly for the college, which affected interstate commerce. *Id.* at 61-62. The defendants moved to dismiss the plaintiffs' complaint on the premise that the university was not-for-profit, therefore, it did not fall under the purview of the Sherman Antitrust Act. *Id.* at 62. The district court agreed and dismissed the claim. *Id.* The plaintiffs appealed and the Second Circuit reversed. The Second Circuit explained that the mere status

as a non-profit educational institution could not shield the college from antitrust regulation. *Id.* at 63-64.

The court further explained that activities associated with education institutions exist on a continuum and they must be analyzed to determine if the activities do in fact affect interstate commerce. *Hamilton Chapter of Alpha Delta Phi, Inc.*, 128 F.3d at 64-66. The court, therefore, held that because Hamilton College's housing policy could reasonably be deemed to affect interstate commerce, dismissal on this ground was improper. *Id.* at 67.

Hamilton lends support to the plaintiffs' monopoly claim only to the extent that Yale's housing policy can be reasonably deemed to affect interstate commerce. *Hamilton,* however, does not support the plaintiffs' definition of the relevant market. Accordingly, the amended complaint has failed to define a relevant market within which Yale possesses a monopoly power.

Therefore, the amended complaint has failed to state a claim for relief under 15 U.S.C. §§ 1 and 2. Consequently, counts seven and eight as set forth in the amended complaint are hereby dismissed.

IV. *Breach of Contract and Unjust Enrichment Claims*

It is axiomatic that when all federal claims are disposed prior to trial, a federal court should decline to exercise jurisdiction over any remaining state law claims. *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *DiLaura v. Power Authority of New York,* 982 F.2d 73, 80 (2d Cir.1992). Based upon this precept, the court declines to exercise jurisdiction over the state law claims of breach of contract and unjust enrichment. Thus, counts six and nine as set forth in the amended complaint are hereby dismissed.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss (document no. 11) is hereby GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of February two thousand one.

Docket No. 98-9136

ELISHA D. HACK, JEREMY A. HERSHMAN BATSHEVA GREER AND LISA B. FRIEDMAN,

Plaintiffs-Appellants,

v.

YALE COLLEGE, President & Fellows, d/b/a/ Yale Corp, YALE UNIVERSITY, RICHARD H. BRODHEAD and BETTY TRACHTENBERG,

Defendants-Appellees,

THE RUTHERFORD INSTITUTE,

Amicus Curiae,

THE CATHOLIC LEAGUE FOR RELIGIOUS & CIVIL RIGHTS

Movant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Elisha D. Hack et al.

Upon consideration by the panel that decided the appeal, it is
Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

APPENDIX D

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1 No. 76
Sara Levin, et al.,
Appellants,
v.
Yeshiva University et al.,
Respondents.

2001 NY Int. 89

July 2, 2001

This opinion is uncorrected and subject to revision before publication in the New York Reports.

James D. Esseks, for appellants.
Mark A. Jacoby, for respondents.
Attorney General of the State of New York; Lambda Legal Defense and Education Fund, et al.; Audre Lorde Project, et al.; Association of the Bar of the City of New York; NAACP Legal Defense and Educational Fund, Inc., et al.; Gay and Lesbian Law Students Alliance et al., *amici curiæ*.

CIPARICK, J.:

The New York City Human Rights Law, like the State Human Rights Law, protects certain groups from policies or practices that discriminate against them in areas such as employment, public accommodations and housing (*see*, Executive Law § 296; NYC Admin. Code § 8-107). The City's Human Rights Law goes the additional step of prohibiting policies or practices which, though neutral on their face and neutral in intent, have an unjustified disparate impact upon one or more of the covered groups. In contrast to the State law, the New York City law explicitly extends protection to persons discriminated against on the basis of sexual orientation.

Plaintiffs Sara Levin and Maggie Jones are lesbians enrolled at defendant Yeshiva University's Albert Einstein College of Medicine (AECOM) in the Bronx.[1] Plaintiff Gilda Wildfire appears as an officer of AECOM's lesbian and gay students' organization. The complaint alleges the following facts, which we must accept as true for present purposes: Yeshiva maintains a number of different sized apartments near AECOM for the housing of medical students. AECOM's housing policy restricts university-owned housing to medical students, their spouses and children. All apartment vacancies are filled from a waiting list on a first-come, first-served basis. Married couples, however, receive priority for studio apartments. One-bedroom apartments must be shared by a minimum of two students or a married couple. Two-bedroom apartments must be shared by a minimum of three individuals, with married

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[1] All parties agree that Yeshiva's religious affiliations have no bearing on this appeal. Also, plaintiffs did not plead claims based on either the State or Federal Constitution.

couples having one or more children receiving priority.[2] To receive housing priority, married couples must provide Yeshiva's housing office with acceptable proof of marriage.

Prior to her first year of medical school, plaintiff Sara Levin requested housing for herself and her partner of five years. Pursuant to its policy, AECOM informed her that she had to produce proof of marriage in order to live with a non-student. Unable to produce proof of marriage, Levin accepted housing in an on-campus three-bedroom apartment with two other students. Levin's request for housing with her partner was again denied the following year. Eventually, Levin and her partner moved into an off-campus apartment in Brooklyn. In her first year of medical school, plaintiff Maggie Jones was also denied housing with her partner. Jones accepted a one-bedroom apartment with another AECOM student during her first year, but then also relinquished campus housing to live with her partner off-campus.

Plaintiffs commenced this action in 1998 claiming that defendants' housing policy discriminated against them based on marital status in violation of the New York State and City Human Rights Laws and that it had a disparate impact against lesbians and gay men in violation of the City Human Rights Law (NYC Admin. Code § 8-107[5] and [17]). In lieu of answering, defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(7). Supreme Court granted defendants' motion and dismissed the complaint in its entirety. The Appellate Division affirmed, agreeing that

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[2] The complaint alleges, at paragraph 9, that university- owned housing is restricted to "Yeshiva students, their spouses and children." Presumably, a single parent, regardless of sexual orientation, would be eligible to reside in university-owned housing with his or her child. The complaint is silent on this subject. However, defendants appear to concede the point in their brief.

there was no discrimination or disparate impact on homosexuals, since defendant's policy "had the same impact on non-married heterosexual medical students as it had on non- married homosexual medical students" (272 A.D.2d 158). Because plaintiffs have pleaded allegations sufficient to raise an issue of fact as to whether defendants' housing policy has a disparate impact on the basis of sexual orientation under the New York City law, we now modify the order of the Appellate Division and remit this case to the Supreme Court for further proceedings.

Marital Status

Contrary to plaintiffs' assertions, AECOM's policy did not discriminate on the basis of marital status on its face. This question is settled by our prior holdings in *Matter of Pizza Hut v New York State Human Rights Appeal Bd.* (51 NY2d 506) and *Hudson View Properties v Weiss,* (59 NY2d 733).

As we held in *Matter of Pizza Hut*, and then again in *Hudson View*, for purposes of applying the statutory proscription, a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship -- or absence thereof -- with another person. Just as the lease provision in *Hudson View* did not turn on the marital status of the tenant, but instead validly limited occupancy to only those in a legal, family relationship with the tenant, AECOM's housing policy is restricted to those in legally recognized, family relationships with a student, not the student's marital status (*see, Hudson View Properties v Weiss, supra*, 59 NY2d, at 735).

In our view, AECOM's housing policy -- limiting cohabitational housing eligibility to students, their spouses

and dependent children -- is substantially indistinguishable from the policy considered in *Hudson View* limiting occupancy to tenants and their "immediate family." For this reason, the policy does not facially discriminate on the basis of marital status and the causes of action alleging such discrimination, as prohibited by both the State and City Human Rights Laws were properly dismissed.

Sexual Orientation

Section 8-107(5)(a)(1) of the Administrative Code of the City of New York makes it an unlawful discriminatory practice to refuse housing accommodations to any person because of that person's "actual or perceived race, creed, color, national origin, gender, age, disability, *sexual orientation*, marital status, or alienage or citizenship status * * * " (emphasis supplied). At the outset, we note that this provision applies to those who provide public or private housing accommodations, and so Yeshiva's status as a private institution does not exempt it from the enactment. While denying its violation, Yeshiva concedes that it is subject to the City Human Rights Law. Plaintiffs, as members of a protected class, allege a violation of the New York City Human Rights Law, section 8-107(17), which creates a cause of action for "an unlawful discriminatory practice based upon disparate impact."

A claim of discrimination based on sexual orientation can be stated where a facially neutral policy or practice has a disparate impact on a protected group (NYC Admin. Code § 8-107[17][a][1]-[2]). Under that section, a claim is established where a plaintiff demonstrates that a defendant's policy or practice "results in a disparate impact to the detriment of any group protected" under the City Human

Rights Law (*id.*).[3] Our inquiry at this stage concerns whether the complaint sufficiently pleads that AECOM's housing policy has such a disparate impact on the basis of sexual orientation. How impact is measured is obviously a critical determination.

Instructive in this regard is *Griggs v Duke Power Co.* (401 US 424). In *Griggs*, plaintiffs, African-American employees of the defendant utility, alleged that their employer violated Title VII of the Civil Rights Act of 1964 by instituting a policy that required all applicants for certain positions to have earned a high school diploma and/or pass a standardized test. Plaintiffs argued that the policy was discriminatory not because it targeted African-Americans but because, statistically, it disqualified African-Americans at a higher rate than white candidates. The lower courts held that defendant's policy was not suspect because it was keyed solely to educational achievement, and there had been no showing of discriminatory intent.

The United States Supreme Court reversed, holding that under the Civil Rights Act, "practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices" (*Griggs, supra*, 401 US, at 430). Looking beyond facial neutrality the Court stated "[the Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but

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[3] Once that showing has been made, defendant has an opportunity to plead and prove as an affirmative defense that the policy or practice complained of "bears a significant relationship to a significant business objective." The defense is defeated, however, when plaintiff produces substantial evidence of an available alternative policy or practice with less disparate impact, and defendant fails to prove that the alternative policy or practice would not serve defendant's significant business objective as well as the complained-of policy or practice (NYC Admin. Code § 8-107[17][a][2]).

discriminatory in operation" (*id.* at 431). The Court concluded that the facially neutral hiring and promotional requirements operated to exclude African-Americans at a significantly higher rate than similarly situated white applicants. In such a context, a prima facie case of disparate impact is established when it is demonstrated that a test or policy "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants" (*Albemarle Paper Co. v Moody*, 422 US 405, 425; *see also, Dothard v Rawlinson*, 433 US 321, 329-330 [comparing ratio of men to women nationally to ratio of men to women who had qualified for positions as corrections officers]).

Twenty years after *Griggs*, in 1991, the City of New York enacted Human Rights Law section 8-107(17), explicitly creating a disparate impact cause of action for plaintiffs who can demonstrate "that a policy or practice of a covered entity [e.g., employer, housing provider] or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any [protected] group" (NYC Admin. Code § 8-107[17][a]). Unlike the State Human Rights Law, the City law both specifies a right of action for policies or practices that have a disparate impact and specifically prohibits any form of discrimination based on sexual orientation. The New York City Council also explicitly made "disparate impact" applicable to discrimination claims outside of the employment context (NYC Admin. Code § 8-107[17]).

Here, the Appellate Division held that, as a matter of law, AECOM's housing policy did not have a disparate impact on plaintiffs on the basis of sexual orientation. It reached that conclusion by also ruling as a matter of law that married students had to be excluded from consideration for purposes of comparison between the benefitted and excluded

classes. We conclude that the court erred in dismissing the complaint on that basis.

The exclusion of married students from the necessary comparison group conflicts with controlling disparate impact methodology and analysis. Self-evidently, married students make up a significant portion of the very class of persons made eligible by AECOM's policy for the substantial economic and social benefits of cohabiting with non-students in university-owned housing. In no presently authoritative precedent, either Federal or from our Court, has a plaintiff in a disparate impact discrimination case been precluded from pointing to the composition of the class of persons rendered eligible for benefits under the challenged policy at issue. Excluding a large portion of the class benefitted by this policy from the disparate impact comparison group would render the disparate impact analysis articulated in *Griggs* (401 US 424, *supra*) meaningless. To illustrate, the result in *Griggs* would have been entirely different had the plaintiffs been prevented from analyzing the racial composition of those actually offered employment under the company's hiring policy requiring successful test completion and/or a high school diploma. As a result, just as in the Appellate Division's ruling here, the only comparison would have been between those African-American and white persons without high school diplomas or passing test scores. And, since 100% of both classes were not the recipients of favorable treatment, no disparate impact would have been established, thereby frustrating Congressional policy as applied to that case.

Here, the Appellate Division declared that only unmarried AECOM students were the proper comparison group, citing *Hudson View Properties v Weiss* (59 NY2d 733) as its basis. In so doing, the court apparently adopted

one of defendants' two principal justifications for excluding consideration of married students.

According to defendants, *Hudson View* established the legality of their housing policy, based upon the marital relationships of students and non-students, as against *any* discrimination challenge. On the basis of that assumption, defendants conclude that "married students are not similarly situated to other students because the distinction that the housing policy draws on the basis of marital relationship is a *lawful* one" (defendants' brief, at 32 [emphasis in the original]). The fallacy of this premise is easily demonstrated.

Hudson View holds only that a landlord's restriction limiting occupancy to a tenant's immediate family does not violate prohibitions against facial discrimination based upon marital status. It does not, however, determine the question of whether the same policy would constitute prohibited disparate treatment or disparate impact discrimination based upon sexual orientation or, indeed, discrimination against any other statutorily protected class. Thus, if AECOM had limited cohabitational university housing to married students of a particular race and their non-student spouses, such a policy would arguably be "lawful" with respect to marital status discrimination under *Hudson View*, since it would be based upon the relationships and characteristics of the particular partners, not upon their marital status as such. No one would seriously contend, however, that such a policy would not constitute illegal discrimination based upon race. Likewise here, the legality of AECOM's policy with respect to a marital status discrimination claim cannot insulate it from a sexual orientation discrimination claim.

Defendants' alternative argument is likewise unavailing. They assert that, because State law limits marriage to a union between a man and a woman, marriage-

based requirements, by their very terms, *facially* discriminate on the basis of sexual orientation. "[I]t is analytically false to characterize a 'marriage-based requirement' as being a 'facially neutral policy' vis a vis sexual orientation" (Defendants' Brief, at 34). From that proposition, defendants draw the conclusion that married students must therefore be entirely excluded from the disparate impact analysis: "Because being married is not a facially neutral criterion as to [a]ppellants' claims of discrimination on the basis of sexual orientation, the courts below were correct in excluding married students from the composition of the similarly situated groups to be compared" (*id.*).

This reasoning is flawed in two critical respects. First, a university's housing policy could not be facially discriminatory on the basis of sexual orientation if the criterion used to determine whether housing was awarded operated to exclude both heterosexual and homosexual students while, at the same time, conferred housing to a distinct group, also comprised of both homosexual and heterosexual students.

That is exactly the case here. As defendants have conceded, not only students with spouses, but also students with dependent children, *regardless of sexual orientation,* are entitled to housing priorities under AECOM's policy. Conversely, not only gay and lesbian students and their partners are excluded from cohabitational housing, but also heterosexual students and their partners who, for whatever reason, are unable or unwilling to marry, as well as heterosexual and homosexual students who wish to live with relatives not qualifying as dependent children. Second, even if we were to accept defendants' proposition that AECOM's housing policy lacks facial neutrality "vis a vis sexual orientation," then AECOM would be compelled to acknowledge that its policy was facially discriminatory and,

thus, in direct violation of the City's Human Rights Law on the basis of disparate treatment, without the necessity of establishing disparate impact.

Defendants' position here essentially distills to the proposition that AECOM's policy must be viewed as distinguishing between two nonsimilarly-situated groups: married students on the one hand who, by law, do not include homosexuals, and non-married students on the other. In short, AECOM's premise is that the comparison groups must be separated along the facially neutral lines drawn by its policy. The flaw in this analysis is demonstrated in the Congressional repudiation of both the result and the reasoning of the Supreme Court's decision in *General Electric Co. v Gilbert* (429 US 125) (*see, Newport News Shipbuilding and Dry Dock Co. v EEOC*, 462 US 669).

At issue in *General Electric v Gilbert* was a company employee disability plan that gave its workers benefits during periods of disability due to all nonoccupational causes except pregnancy. The majority in *Gilbert* held that the plaintiffs failed to establish a Civil Rights Act Title VII violation for discrimination based upon gender, employing a rationale almost indistinguishable from that advanced here by defendants. That is, that the disability plan created two separate and dissimilar groups: (1) pregnant women (based on their physical condition, not gender); and (2) nonpregnant men and women, who were treated equally for benefit eligibility (*see, Gilbert*, 429 US, at 134-135). The dissenters in *Gilbert* rejected that analysis as "simplistic and misleading" (*id.*, at 152). The relevant comparison, according to the dissenters, had to be the overall disability coverage afforded men as against that afforded women (*see,* 429 US, at 155, 160 [Brennan, J., dissenting]; *id.*, at 161 [Stevens, J., dissenting]). Under that analytical framework, the General Electric plan -- which insured employees, male

and female, against all risks of disability except pregnancy, the single risk that is unique to women -- was discriminatory based upon gender under the proper disparate impact analysis.

As fully explained in *Newport News Shipbuilding and Drydock Co.*, in 1978, Congress overruled and repudiated the reasoning of *Gilbert*, and the legislative history expressly adopted the views of the dissenters in that case (*see, Newport News, supra,* 462 US, at 678-679). Just as in *Gilbert*, the attempt here is to extract married medical students -- the very group benefitted by AECOM's housing policy -- from consideration in any disparate impact analysis thereby obscuring any realistic examination of the discriminatory effects of that policy.

In order to determine whether AECOM's housing policy has a disparate impact that falls along the impermissible lines of sexual orientation, there must be a comparison that includes consideration of the full composition of the class actually benefitted under the challenged policy. Because the Appellate Division's exclusion of at least a significant portion of that benefitted group constituted error as a matter of law, the cause of action alleging disparate impact discrimination based on sexual orientation as proscribed by the New York City Human Rights Law § 8-107(17) was improperly dismissed on the pleadings and must be reinstated and remitted to Supreme Court for further proceedings. If, upon remittal, plaintiffs establish that AECOM's policy regarding university-owned housing with non-students disproportionately burdens lesbians and gay men, the City Administrative Code requires that defendants justify their policy as bearing a "significant relationship to a significant business objective" (NYC Admin Code § 8-107[17][a][2]). The claims of plaintiff Wildfire, who lacked standing, were properly dismissed.

Accordingly, the order of the Appellate Division should be modified, without costs, by reinstating the seventh cause of action of plaintiffs Levin and Jones and, as so modified, affirmed.

Smith, J. (concurring):

I agree with the majority that there is no marital status discrimination. I also agree that the plaintiffs have stated a claim under the disparate impact section of New York City Administrative Code § 8-107(17). Because I interpret that provision differently than the majority does, I concur but do not join the disparate impact section of the opinion.

Plaintiffs are medical students at defendant Einstein College of Medicine, a division of the defendant Yeshiva University, a private educational institution. Defendants offer housing at below market rates in apartment buildings near campus. This housing includes studio, one-bedroom and two-bedroom apartments and is made available to students, their spouses and children.

Plaintiffs Levin and Jones, medical students, alleged that their request to have their same-sex partners live with them was denied because they were not married. Plaintiffs each accepted the affordable housing offered to them as individuals, but later moved out of their university apartments in order to live with their partners.[4]

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[4] The third named plaintiff, Wildfire, is secretary and treasurer of a lesbian and gay student organization whose members include Levin, Jones and other students negatively affected by the defendants' policy.

Plaintiffs commenced an action in Supreme Court, alleging that defendants' housing policy discriminates on the basis of marital status in violation of the New York City and State Human Rights Laws,[5] violates Real Property Law § 235-f, the Roommate Law, and has a disparate and detrimental impact on gay and lesbian students because it discriminates on the basis of sexual orientation in violation of New York City Human Rights Law. The seventh cause of action alleges specifically:

> "38. By allowing married spouses of AECOM students to live in university housing but prohibiting non-married partners of AECOM students to live in university housing, defendants have engaged in a practice that has a disparate impact on lesbians and gay men and that therefore discriminates on the basis of sexual orientation in housing in violation of New York Administrative Code § 8-107(5) and (17)."

On defendants' motion, Supreme Court dismissed the complaint. Citing *Matter of Manhattan Pizza Hut, Inc. v New York State Human Rights Appeal Bd.* (51 NY2d 506, 512), in which the Court of Appeals concluded that discrimination based on marital status did not cover an individual's relationships but covered discrimination because a person was single, married, separated, divorced or widowed, the

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[5] Specifically, the first five causes of action allege discrimination on the basis of marital status in violation of New York Executive Law § 296(5)(a)(1), NYC Administrative Code § 8-107(5) and New York Executive Law §§ 296 (2-a), 296(4) and 296(5)(a)(3) respectively. The sixth cause of action alleges a violation of the Roommate Law, NY Real Property Law § 235-f.

Supreme Court held that plaintiffs failed to state a cause of action for marital status discrimination under the New York City and State Human Rights Laws. The court also concluded that plaintiffs failed to state a cause of action for violation of the Roommate Law, because it was not intended to cover temporary college housing.

Noting that plaintiffs were offered and accepted university housing, the trial court further held that a cause of action under a disparate impact theory did not lie because plaintiffs' ability to obtain housing was not adversely affected insofar as they were given housing as individuals. The court reasoned that insofar as society generally affords benefits to married couples, it was entitled to act in accordance with such general principles. It reasoned further that plaintiffs' real complaint lay with the Legislature's refusal to sanction same-sex marriages and concluded that plaintiffs should seek policy reform with the Legislature.

The Appellate Division affirmed. It concluded that plaintiffs had not stated a marital status discrimination cause of action and cited *Matter of Manhattan Pizza Hut v New York State Human Rights Appeal Bd.* (*supra,* 51 NY2d 506) and *Hudson View Props. v Weiss*, (59 NY2d 733 [plaintiff whose lease limited occupancy to the tenant and her immediate family but who lived in the apartment with an unmarried man could be evicted]). It also concluded that plaintiffs had not stated a cause of action for discrimination based on a disparate impact theory because defendants' policy had the same impact on non-married heterosexual medical students as it had on non-married homosexual medical students. Finally, it concluded that plaintiffs had failed to state a cause of action for violation of the Roommate Law because the policy applied only to premises occupied by a tenant as his or her primary residence and not to tenants living temporarily in student housing.

On this appeal, plaintiffs argue that (1) they have stated a cause of action for violation of the New York City Human Rights Law, New York City Administrative Code § 8-107(17) ("the City HRL") because defendants' housing policy discriminates on the basis of sexual orientation by creating a disparate impact on gay and lesbian students; (2) that the appropriate comparison for disparate impact purposes is between married persons and homosexual persons in committed relationships; (3) that the Appellate Division erred in failing to adequately apply the disparate impact analysis of *Griggs v Duke Power Co.* (401 US 424); and (4) that the Appellate Division erred in concluding that the defendants' policy can have no disparate impact because it treats all "non-married" people identically.[6]

Defendants argue (1) that plaintiffs have not alleged a disparate impact claim; (2) that the relevant categories for determining a disparate impact are non-married heterosexual students and non-married homosexual students; and (3) that when the appropriate categories are analyzed, plaintiffs suffered no greater impact as a result of the housing practice than similarly situated heterosexual non-married students.

New York City Administrative Code § 8-107(17) states, in part:

> "An unlawful discriminatory practice based upon disparate impact is established when: (1) the commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity

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[6] Plaintiffs did not seek leave to appeal the dismissal of their cause of action under the Roommate Law.

> results in a disparate impact to the detriment of any group protected by the provisions of this chapter."

Griggs v Duke Power Co. (401 US 424) does not support the contention of plaintiffs. In that case, where defendant Duke Power Company had a longstanding policy of excluding African Americans, the Supreme Court held that a test or a high school diploma could not be used to prevent the hiring of African Americans where neither was necessary for the jobs in question. The Court used disparate impact analysis to reveal the continuing policy of discrimination against African Americans, discrimination forbidden by Title VII of the Civil Rights Act of 1964. In its decision, the Supreme Court stated:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" (401 US 424).

In order to apply *Griggs v Duke Power Co.* to the facts here, this Court must conclude that the traditional practice of private universities of granting housing preferences to married couples is unlawful discrimination, as well as being unlawful in its discriminatory impact. I am unable to draw that conclusion, particularly when marriage is

a fundamental constitutional right (*see, Loving v Virginia, 388 US 1; Zablocki v Redhail*, 434 US 374) and the State has sought to recognize and support marriage as a positive institution. Despite the inapplicability of *Griggs v Duke Power Co.* to the facts here, there is another interpretation of Section 8-107 (17) that supports plaintiffs' position. It is that the legislation is designed to secure for unmarried, committed couples the same benefits as those enjoyed by married persons. Thus, under the legislation, same-sex couples who are in committed relationships would be able to secure housing and other benefits on the same basis as married couples.[7] The language of § 8-107 supports this interpretation. Thus, the action should not be dismissed, and defendants should be given the opportunity to prove that the University's policy "bears a significant relationship to a significant business objective" or that there is no disparate impact (Administrative Code § 8-107[17]).

Kaye, Chief Judge (concurring in part and dissenting in part):

I concur in the majority's conclusion that plaintiffs have stated a claim that AECOM's housing policy has a disparate impact on gays and lesbians, in violation of the New York City Human Rights Law, and that the disparate impact claim should be remitted to Supreme Court for further proceedings. I further conclude that plaintiffs have stated a claim of marital status discrimination.

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[7] In *Baker v State* (744 A2d 864)the Vermont Supreme Court held that plaintiffs, same-sex couples were entitled to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples" (*id.*, at 886), and further held that "the current statutory scheme [would] remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion" (*id.*, at 887). On July 1, 2000, Vermont's civil unions law took effect (*see*, Vt Stat Annot, tit 15, § 1204).

Both the State and City Human Rights Laws make it illegal to withhold a housing accommodation from any person because of that person's marital status (*see*, Executive Law §§ 296[2-a][a], 296[5][a][1]; NYC Admin Code § 8-107[5][1]). As this case comes to us in the context of a motion to dismiss, we must, for the purposes of this appeal, take plaintiffs' allegations as true. Here, plaintiffs allege that they were denied access to partner housing -- a type of housing accommodation offered by AECOM -- simply because they were not married. AECOM permits married students to live in student housing with their partners; only unmarried students are denied this benefit. When plaintiffs applied for housing for their partners, the sole question asked by AECOM was whether they were married. Since plaintiffs could not present marriage certificates, they were denied access to the housing benefits they sought. For present purposes, these allegations state a claim of discrimination based on marital status.

Our decisions in *Hudson View Properties v Weiss,* (59 NY2d 733) and *Manhattan Pizza Hut v New York State Human Rights Appeal Board* (51 NY2d 506) are not to the contrary. In *Hudson View*, a landlord sought to evict a female tenant for violating a provision in the lease limiting occupancy to the tenant and her "immediate family." The tenant was sharing the apartment with a man who admittedly was not part of her immediate family (59 NY2d at 735). This Court held that the lease provision was enforceable, rejecting the tenant's argument that it constituted marital status discrimination. The Court stated, "the issue arises not because the tenant is unmarried, but because the lease restricts occupancy of her apartment * * * to the tenant and the tenant's immediate family" (*id.*). Thus, the Court concluded, the "applicability of that restriction does not depend on her marital status" (*id.*).

The extent of our holding in *Hudson View* was that a landlord does not engage in marital status discrimination by denying housing to a person who is not part of the tenant's immediate family. Unlike the tenant in *Hudson View*, plaintiffs have never admitted that their life partners are not part of their immediate families. Indeed, the gravamen of plaintiffs' complaint is that they share the same level of commitment with their partners as married persons share with their spouses -- that their life partners *are* members of their immediate families. But AECOM's policy does not permit students to live in student housing with all immediate family members; rather, it permits them to live only with *spouses* and children. Thus, AECOM's policy is not "substantially indistinguishable from the policy considered in *Hudson View*" (Majority Opinion, at 5).

Significantly, in *Braschi v Stahl Associates Co.* (74 NY2d 201, 211), a plurality of this Court concluded that a tenant's same-sex life partner qualified as "family" under the non-eviction protection provisions of the New York City rent control law, stating that term "family" includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." Indeed, in *Hudson View* the Court noted that it was not called upon to address whether the tenant's boyfriend could become part of her family "by marriage or otherwise" (59 NY2d at 735). Clearly then, this Court has recognized that the concept of "family" can include more than just married couples and their children.

At the very least, it is a question of fact whether plaintiffs' life partners qualify as members of their "immediate families." If they do, the State and City Human Rights Laws prohibit AECOM from denying them partner housing merely because they are unmarried. Since discovery

and factfinding on this issue are necessary, the lower courts improvidently granted AECOM's motion to dismiss.

Similarly inapposite is *Manhattan Pizza Hut v New York State Human Rights Appeal Board.* In that case, the Court upheld Pizza Hut's anti-nepotism rule forbidding an employee from working under the supervision of a spouse, parent, sibling or offspring. Plaintiff was fired for being married to her supervisor, and she brought suit alleging marital status discrimination under the State Human Rights Law. Recounting the many sound reasons supporting Pizza Hut's anti-nepotism rule, this Court upheld the termination, stating that the Human Rights Law does not prohibit discrimination based on an employee's "relationships" (51 NY2d at 513-514). The Court concluded that plaintiff had not suffered marital status discrimination because she was fired not for being married but "for being married to her supervisor" -- a valid anti-nepotism concern (*id.*, at 514).

Here, by contrast, plaintiffs were not denied partner housing because of their relationship to any particular person, and certainly not for violating an anti-nepotism or anti-corruption rule. Rather, they were denied partner housing merely because they were unmarried. Indeed, *Pizza Hut* itself states that the Human Rights Law bars decisions from being made on the basis of whether a person is "single, married, divorced, separated or the like" (*id.*, at 512). That is exactly what happened here.

As to plaintiffs' disparate impact claim, the City Human Rights Law makes it illegal to deny access to housing accommodations on the basis of sexual orientation (*see*, NYC Admin Code §8-107[5][a][1]). A prima facie case of discrimination is shown where a facially neutral policy has a disparate impact on a protected group (*see*, NYC Admin Code § 8-107[17][[a][1]-[2]). If plaintiffs

demonstrate a disparate impact and proffer an alternative, less discriminatory policy, the burden then shifts to the defendant to show that a significant business objective is served by its policy (*see*, NYC Admin Code § 8-107[17][a][2]).

Here, AECOM's policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, because they cannot marry and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners.

The Appellate Division erred by holding that the appropriate comparison groups were *unmarried* heterosexual students versus *unmarried* homosexual students. This holding defined plaintiffs' claim out of existence, since the disparate impact is created by AECOM's restriction of partner housing to *married* students. As the United States Supreme Court held in *Griggs v Duke Power* (401 US 424), the comparison groups may not be defined in such a way. Further, it is immaterial that State law permits only heterosexual marriage. The City Human Rights Law specifically bans housing discrimination on the basis of sexual orientation. The State marriage law merely defines who can and cannot marry; it was not intended to permit landlords to violate New York City's laws against housing discrimination.

Therefore, since plaintiffs have stated a prima facie case of discrimination based on sexual orientation, the case must be remitted for application of the burden-shifting method mandated by the City Human Rights Law.

Finally, I agree that plaintiff Gila Wildfire's claims must be dismissed for lack of standing.

Accordingly, I would modify the order of the Appellate Division by affirming the dismissal of plaintiff Wildfire's claims, and by reinstating the marital status and sexual orientation claims asserted by plaintiffs Levin and Jones and remitting those claims to Supreme Court for further proceedings.

Order modified, without costs, by reinstating the seventh cause of action of plaintiffs Levin and Jones and, as so modified, affirmed. Opinion by Judge Ciparick. Judges Levine, Wesley, Rosenblatt and Graffeo concur. Judge Smith concurs in result in an opinion. Chief Judge Kaye concurs in part and dissents in part in an opinion.

Decided July 2, 2001